

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 VS. CR. NO. 15-4268 JB

6 ANGEL DELEON, et al.,

7 Defendants.

8
9 Transcript of Motion Proceedings before
10 The Honorable James O. Browning, United States
District Judge, Albuquerque, Bernalillo County,
New Mexico, commencing on November 29, 2016.
11

12 For the Government: Ms. Maria Armijo; Mr. Matthew
Beck; Mr. Randy Castellano
13

For the Defendants: Mr. Brock Benjamin; Ms. Cori
Harbour-Valdez; Mr. Patrick Burke; Mr. Jim Castle;
Mr. Robert Cooper; Mr. Dean Clark; Mr. Doug Couleur;
Mr. James Lahann; Mr. Orlando Mondragon; Mr. Noel
Orquiz; Mr. Scott Davidson; Mr. Pedro Pineda; Mr.
Gary Mitchell; Mr. Larry Hammond; Mr. Santiago
Hernandez; Steven Almanza; Ms. Mary Stillinger; Mr.
Richard Jewkes; Mr. B. J. Crow; Mr. Marc Lowry; Ms.
Theresa Duncan; Ms. Amy Sirignano; Mr. Christopher
Adams; Mr. Michael Davis; Mr. Ryan Villa; Ms. Justine
Fox-Young; Mr. Donovan Roberts; Ms. Erlinda Johnson;
Ms. Angela Arellanes; Mr. Wayne Baker
20

21 For the Defendants (Via telephone): Ms. Margaret
Strickland; Mr. Keith Romero; Mr. Nathan Chambers
22
23
24
25

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1 THE COURT: Good morning everyone. I
2 appreciate everyone making themselves available to me
3 this morning.

4 All right. The Court will call United
5 States of America versus Angel DeLeon, Criminal
6 Matter No. 15-CR-4268 JB.

7 If counsel will enter their appearances for
8 the Government.

9 MS. ARMIJO: Good morning. Your Honor.
10 Maria Armijo, Randy Castellano, and Matthew Beck on
11 behalf of the United States.

12 THE COURT: All right. Ms. Armijo, Mr.
13 Castellano, Mr. Beck, good morning to you.

14 So Mr. DeLeon is still a fugitive, so we'll
15 start with Defendant Joe Lawrence Gallegos.

16 MR. BENJAMIN: Good morning, Your Honor.
17 Brock Benjamin on behalf of Mr. Gallegos.

18 THE COURT: Mr. Benjamin, good morning to
19 you. Mr. Gallegos, good morning to you.

20 THE DEFENDANT: Good morning.

21 THE COURT: And for Defendant Edward Troup.

22 MS. HARBOUR-VALDEZ: Good morning, Your
23 Honor, Cori Harbour-Valdez and Pat Burke on behalf of
24 Mr. Troup.

25 THE COURT: All right. Ms. Harbour-Valdez,

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1 Mr. Burke, Mr. Troup, good morning to you.

2 And for Defendant Leonard Lujan?

3 MR. CLARK: Good morning, Your Honor. Dean
4 Clark on behalf of Mr. Lujan.

5 THE COURT: Mr. Clark, Mr. Lujan, good
6 morning to you.

7 And for Defendant Billy Garcia?

8 MR. COOPER: Good morning, Your Honor. Bob
9 Cooper and Jim Castle on behalf of Billy Garcia.

10 THE COURT: All right. Mr. Cooper, Mr.
11 Castle, Mr. Garcia, good morning to you.

12 THE DEFENDANT: Good morning.

13 THE COURT: And for Defendant Eugene
14 Martinez?

15 MR. COULEUR: Your Honor, Doug Couleur for
16 Eugene Martinez.

17 THE COURT: Mr. Couleur, Mr. Martinez, good
18 morning to you.

19 And for Defendant Allen Patterson?

20 MR. LAHANN: Good morning, Your Honor.
21 Jack Lahann on behalf of Mr. Patterson.

22 THE COURT: Mr. Lahann, Mr. Patterson, good
23 morning to you.

24 THE DEFENDANT: Good morning, Your Honor.

25 THE COURT: And for Defendant Christopher

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1 Chavez?

2 MR. MONDRAGON: Good morning, Your Honor.

3 Orlando Mondragon on behalf of Mr. Chavez.

4 THE COURT: Mr. Mondragon, Mr. Chavez, good
5 morning to you.

6 And for Defendant Javier Alonso?

7 MR. ORQUIZ: Good morning, Your Honor.

8 Noel Orquiz for Javier Alonso.

9 THE COURT: Mr. Orquiz, Mr. Alonso, good
10 morning to you. And is Mr. Chambers here yet? He's
11 going to appear a little bit later by telephone?

12 MR. ORQUIZ: Yes, sir, he had a court
13 hearing in Denver this morning, and he will call in
14 as soon as he is able.

15 THE COURT: All right.

16 And for Defendant Arturo Arnulfo Garcia?

17 MR. DAVIDSON: Your Honor, Scott Davidson
18 sitting in for Billy Blackburn for Mr. Garcia.

19 THE COURT: All right. Mr. Davidson,
20 Mr. Garcia, good morning to you. Mr. Garcia, Billy
21 Blackburn is your normal attorney -- well, I don't
22 know if we should call Billy "normal," but he's your
23 usual attorney; right?

24 THE DEFENDANT: He is.

25 THE COURT: And you consent to Mr. Davidson

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1 being your attorney today?

2 THE DEFENDANT: Yeah, that's fine.

3 THE COURT: All right. And for Defendant
4 Ruben Hernandez?

5 MR. PINEDA: Good morning, Your Honor.

6 Pedro Pineda on behalf of Mr. Hernandez.

7 THE COURT: Mr. Pineda, Mr. Hernandez, good
8 morning to you.

9 And for Defendant Jerry Armenta?

10 MR. MITCHELL: Good morning, Your Honor.

11 Gary Mitchell on behalf of Mr. Armenta, who also
12 appears.

13 THE COURT: Mr. Mitchell, Mr. Armenta, good
14 morning to you.

15 THE DEFENDANT: Good morning.

16 THE COURT: And let's get counsel that are
17 here in the courtroom for Defendant Jerry Montoya.

18 MR. HAMMOND: Good morning, Your Honor.

19 Larry Hammond on behalf of Mr. Montoya, who is here
20 with me to my left. And my co-counsel, Margaret
21 Strickland, I believe, is on the telephone.

22 THE COURT: All right. Mr. Hammond, Mr.
23 Montoya -- Ms. Strickland, are you there?

24 MS. STRICKLAND: I am, Your Honor.

25 THE COURT: Good morning to you,

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1 Ms. Strickland.

2 MS. STRICKLAND: Good morning, Your Honor.

3 THE COURT: And for Defendant Mario
4 Rodriguez?

5 MR. HERNANDEZ: Good morning, Your Honor.

6 Santiago Hernandez on behalf of Mr. Rodriguez.

7 THE COURT: Mr. Hernandez, Mr. Rodriguez,
8 good morning to you.

9 THE DEFENDANT: Good morning, Your Honor.

10 THE COURT: And for Defendant Timothy
11 Martinez?

12 MR. ALMANZA: Good morning, Your Honor,
13 Steve Almanza on behalf of Timothy Martinez.

14 THE COURT: All right. Mr. Almanza, Mr.
15 Timothy Martinez, good morning to you.

16 THE DEFENDANT: Good morning.

17 THE COURT: And for Defendant Mauricio
18 Varela?

19 MS. STILLINGER: Good morning, Your Honor.
20 Mary Stillinger for Mr. Varela.

21 THE COURT: All right. Ms. Stillinger and
22 Mr. Varela, good morning to you.

23 And for Defendant Daniel Sanchez?

24 MR. JEWKES: Good morning, Your Honor.
25 Richard Jewkes, representing Daniel Sanchez, who is

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1 present before the Court and ready to proceed.

2 THE COURT: All right. Mr. Jewkes, Mr.
3 Sanchez, good morning to you.

4 For Defendant Conrad Villegas?

5 MR. CROW: Good morning, Your Honor. B.J.
6 Crow for Mr. Villegas, who is present.

7 THE COURT: Mr. Crow, Mr. Villegas, good
8 morning to you.

9 THE DEFENDANT: Good morning.

10 THE COURT: And for Defendant Anthony Ray
11 Baca?

12 MR. LOWRY: Good morning, Your Honor. Marc
13 Lowry and Theresa Duncan on behalf of Anthony Ray
14 Baca, who is present in the courtroom.

15 THE COURT: All right. Mr. Lowry, Ms.
16 Duncan, Mr. Baca, good morning to you.

17 THE DEFENDANT: Good morning, Your Honor.

18 THE COURT: And for Defendant Christopher
19 Garcia?

20 MS. SIRIGNANO: Good morning, Your Honor.
21 Amy Sirignano and Christopher Adams on behalf of
22 Christopher Garcia.

23 THE COURT: All right. Ms. Sirignano, Mr.
24 Adams, Mr. Garcia, good morning to you.

25 And for Defendant Carlos Herrera?

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1 MR. DAVIS: Good morning, Judge. Michael
2 Davis on behalf of Mr. Herrera.

3 THE COURT: Mr. Davis, Mr. Herrera, good
4 morning to you.

5 And for Defendant Rudy Perez?

6 MR. VALLE: Good morning, Your Honor. Ryan
7 Villa on behalf of Mr. Perez, along with my
8 co-counsel, Justine Fox-Young, for Mr. Perez.

9 THE COURT: All right. Mr. Villa, Ms.
10 Fox-Young, Mr. Perez, good morning to you.

11 And for Defendant Andrew Gallegos?

12 MR. ROBERTS: Good morning, Judge. Donovan
13 Roberts on behalf of Mr. Gallegos.

14 THE COURT: All right. Mr. Roberts, Mr.
15 Gallegos, good morning to you.

16 And for Defendant Santos Gonzalez?

17 MS. JOHNSON: Good morning, Your Honor.
18 Erlinda Johnson on behalf Santos Gonzalez.

19 THE COURT: All right. Ms. Johnson, Mr.
20 Gonzalez, good morning to you.

21 And I believe -- for Defendant Paul Rivera,
22 believe you're on the phone, Mr. Romero?

23 MR. ROMERO: Correct, Judge. Keith Romero
24 on behalf of Paul Rivera.

25 THE COURT: Are you able to head back here?

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1 MR. ROMERO: I'm making my way back, Judge.
2 I'm close to an hour out.

3 THE COURT: All right. Mr. Romero, good
4 morning to you. Mr. Rivera, good morning to you.
5 Where is Mr. Rivera here? Okay. There we are. All
6 right. Good morning to you, Mr. Rivera. We'll get
7 him here as soon as we can.

8 And for Defendant Shauna Gutierrez?

9 MS. ARELLANES: Angela Arellanes for Ms.
10 Gutierrez, who appears in person.

11 THE COURT: Ms. Arellanes, Ms. Gutierrez,
12 good morning to you.

13 THE DEFENDANT: Good morning.

14 THE COURT: All right. The United States
15 has filed a motion for me to call the other case so
16 we can have a status conference at the same time.
17 Anybody have any objection to that? All right. So I
18 will call for purposes of the status conference with
19 this case United States of America versus Mauricio
20 Varela, Criminal Matter 15-4269, and I believe the
21 only defendant that's not already in the case is
22 Defendant David Calbert.

23 MR. BAKER: Good morning, Your Honor.

24 Wayne Baker on behalf of Mr. Calbert.

25 THE COURT: All right. Mr. Baker, good

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1 morning to you. Mr. Calbert, good morning to you.

2 THE DEFENDANT: Good morning.

3 THE COURT: All right. I think that's
4 everybody. Anybody else need to make an appearance
5 that I didn't get a name? All right.

6 All right. I guess the first thing we
7 should take up is the motion that Mr. Baca had filed,
8 that many of you joined -- or some of you had
9 joined -- in this case. Mr. Baca filed it in a
10 number of cases. As you know, yesterday in what we
11 call the Baca case, the 12, 13 defendant case, we had
12 a fairly lively lengthy discussion of that. I don't
13 want to cut it off here, but I think Mr. Lowry has
14 explained to you that I'm going to try to put
15 together an opinion and order on what kind of
16 restrictions the marshals have requested, and try to
17 get that to you before I see you again, whenever that
18 may be.

19 In the meantime, I think Mr. Baca has given
20 me his assurance that he'll not try to communicate
21 with any of the defendants, co-defendants in this
22 case. And I, as you can see, have not put any sort
23 of barrier, restriction -- I forgot what it was
24 called, but -- partition; partition, that's the
25 word -- partition, so he can see everything. And the

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1 agreement was that there wouldn't be any
2 communication among the co-defendants in the
3 courtroom. So this being a judicial proceeding,
4 everybody would agree to that. Counsel are not
5 restricted from talking to other counsel. We ask you
6 to communicate through those -- through the counsel,
7 at least here in the courtroom. But those are -- the
8 agreement we worked out until we -- until I could
9 review the submissions that were made. Some of them
10 were coming in in this case, I think last night and
11 this morning. And so I'll try to put a petition -- I
12 mean an order and an opinion together on that.

13 Does anybody else want to say anything
14 about that? I know that some people made some
15 submissions. We had a fairly full and robust
16 argument yesterday. We took some evidence, which
17 I'll consider, and probably making some findings of
18 fact.

19 All right. The next thing I'd like to take
20 up is again -- yes, Mr. Hammond?

21 MR. HAMMOND: Excuse me, your Honor. I had
22 my bad hand up.

23 THE COURT: All right. That's all right.

24 MR. HAMMOND: On behalf of Mr. Montoya, of
25 course, neither my co-counsel, Ms. Strickland, nor I

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1 were present yesterday.

2 I am unaware of any basis or any prior
3 conduct in the hearings where we've been in
4 attendance that have been in any way disruptive or in
5 any way interfere with the judicial process. And I
6 often find, in the course of a long proceeding -- and
7 we're going to have some long ones here -- that
8 communication between all of us becomes part of just
9 surviving in a long case. And there may be lots of
10 unforeseen circumstances that would cause us to wish
11 to communicate.

12 I have a personal rule that I don't
13 communicate with other people's clients, and I think
14 that's appropriate. But certainly, the kind of
15 normal communication that one would typically expect
16 in a courtroom, I believe has happened, and ought to
17 happen. I know of no basis for thinking that either
18 the decorum of the Court or the public safety will be
19 affected.

20 And, Judge, let me say one more word on a
21 personal basis on behalf of my client. I'm sure the
22 Court is not aware of this, but five weeks ago my
23 client was pulled out of Torrance involuntarily by
24 the United States Marshals. He was not told why he
25 was being pulled out. He wasn't told where he was

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1 going. He has been put now in a separate facility in
2 Santa Fe, where he has had no communication with any
3 of the people with whom he had daily communications
4 for months and months and months. He still has not
5 been told why he was moved and why he's been
6 isolated. He is certainly not a cooperator with the
7 Government. I know of no basis for him to be
8 segregated.

9 But I think in his case personally, having
10 not seen any of his colleagues for now five weeks,
11 it's perfectly natural -- and I don't know if he
12 feels this way or not, so I'm just speaking on behalf
13 of myself -- I think it's perfectly natural to think
14 that he may want to communicate with people with whom
15 he spent a great deal of time over the last year.

16 So, on behalf of Mr. Montoya, I would ask
17 that the Court reconsider the order, at least in
18 those times when the Court is not in session.

19 THE COURT: Well, I understand, but I am
20 going to rule consistently across the two cases until
21 I put an order together. And I'll take your comments
22 into account while I put the opinion together. And
23 maybe at the next hearing it will be different. But
24 at least for today, we're going to operate under
25 those rules in both cases. And I think I'm going to

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1 be in another related case tomorrow. So we'll keep
2 those in place until I can get -- think about it in a
3 fuller way, the concern of the marshals is that -- as
4 we went into yesterday -- is that they're
5 communicating about things beside just greetings.
6 And I'll have to give that some thought.

7 Let me get on the record that the Bonito is
8 our overflow courtroom. So I'm looking at a screen
9 here that is showing the bench in the Bonita
10 courtroom, and I assume they're seeing me in the
11 courtroom. So that's what they are seeing. So we do
12 have that, if we need more family members and things
13 of that nature.

14 All right. Anyone else want to speak on
15 the restriction issue before we move onto the motions
16 for today?

17 MR. CASTELLANO: Yes, Your Honor, Jim
18 Castle.

19 THE COURT: Mr. Castle.

20 MR. CASTLE: To the extent the Court is
21 relying upon testimony in a separate proceeding and
22 statements by counsel in a separate proceeding, we'd
23 ask that that transcript be made part of this record.
24 If the Court is going to rely upon it in its
25 decision, which it sounds like the Court is.

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1 THE COURT: That would be fine. I don't
2 know what you mean by "made part of this record."
3 Mr. Baca's motion was filed in three cases, so I'll
4 issue an opinion in the three cases. It will
5 probably have a caption of all three cases on it, and
6 I'll be citing to that. But I guess you can get the
7 transcript out of the other case, if you want it.
8 But I'll be relying on it.

9 Anybody else?

10 All right. Let me take up an issue --
11 again, Mr. Baca filed a joint unopposed motion for
12 disclosure of grand jury and petit jury data to
13 enable him to inspect and photocopy data and
14 procedures used in the selection of the grand and
15 petit juries in the Las Cruces Division of the
16 District of New Mexico. It's unopposed, but we
17 didn't have the position of all parties. So just so
18 that -- before we launch into this, does anybody have
19 any opposition to Mr. Baca's motion? All right. Not
20 hearing any, then I will grant that motion. And I
21 think we talked about it yesterday. I think Mr. Baca
22 is going to -- his counsel are going to work with the
23 United States to put together an order, which will be
24 submitted to me and I'll sign it.

25 All right. I guess the first motion, then,

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1 to take up is the joint motion to vacate the March
2 2017 trial setting, impose a discovery schedule
3 order, and then a request for a hearing. Yesterday
4 what we did is we got the concurrence of all of the
5 counsel in the Baca case, we got their agreement to
6 move their trial, which I think was the sticking
7 point for the motion in this case. So they have
8 agreed that if we will try their case in 2017,
9 they're agreeable to moving it. So we set a trial
10 date of November 2 -- November 6, 2017, so we're
11 hoping that we will be able to live up to the
12 commitment that we made to that group of defendants
13 and parties, but particularly the defendants, some of
14 whom were interested in either moving to sever or
15 accelerating their Speedy Trial Act rights. But they
16 were all in agreement they would consent to the
17 movement of that.

18 So with that, I'm wondering if there is any
19 remaining issues with this motion, or whether we're
20 prepared to grant this motion, and then set a new
21 trial date.

22 Mr. Villa, I think this is largely your
23 product. If you want to speak and tell me if there
24 is any more issues, or if there are issues, what they
25 are.

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1 MR. VILLA: Thank you, Your Honor.

2 THE COURT: Mr. Villa?

3 MR. VILLA: I think that, you know, if the
4 Government is not opposed to moving our trial date
5 then I won't spend a whole lot of time on why it
6 should be moved.

7 I can alert the Court to a few things,
8 since September of 2016, and that the tablet issue,
9 which concerns me in terms of when to set the trial
10 date. So I don't -- I can't speak for all of the
11 defendants, but I know that Mr. Perez was supposed to
12 receive his tablet Wednesday, according to a letter I
13 received from Mr. Aoki, and has not received it. So
14 I think perhaps that's the starting point to
15 determine when can we schedule this thing; the fact
16 that Mr. Perez, and I think a lot of other defendants
17 in this case, don't have their discovery yet.

18 Now, certainly, it doesn't mean we haven't
19 been talking about the case and that sort of thing.
20 But I think they need, in the first instance, to have
21 their discovery and review it.

22 THE COURT: Have you been in touch with Mr.
23 Aoki and found out what the problem is?

24 MR. VILLA: I have not, Your Honor. The
25 letter I received, I want to say Monday last week,

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1 indicated he would have it Wednesday. And today was
2 the first opportunity I had to ask Mr. Perez.

3 THE COURT: Is Wednesday being tomorrow?

4 MR. VILLA: Wednesday of last week, the day
5 prior to Thanksgiving. And so today was the first
6 chance I had to ask Mr. Perez if he has received it,
7 and he has not. And I believe the other defendants
8 who are also housed in Torrance County have not
9 received them, with the exception, perhaps, of Mr.
10 Gallegos, because of his severance.

11 So I think there is an issue there. I know
12 part of the reason the tablets have not been provided
13 is there continues to be discovery production that
14 needs to be uploaded and that sort of thing. And I
15 think that's -- sort of the other issue is the United
16 States is continuing to produce discovery. And it's
17 unclear whether this is new material or has just been
18 obtained, or it's material that perhaps should have
19 been produced in the summer, when the Court ordered
20 it. I can't speak to that. And I can't speak to
21 when --

22 THE COURT: My sense is that this new
23 material is sort of -- we're getting down to the
24 dregs. It's not voluminous; it's just new materials
25 that are being found? Is that your impression?

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1 MR. VILLA: Yeah, I get that sense. And
2 some of it is in response to some of the hearings
3 we've had, which we appreciate the Government
4 producing that in response to these Court's orders.
5 But it also seems to be happening fairly regularly,
6 these new productions. You know, sometimes every
7 week, sometimes every couple of weeks, the new
8 material is provided. And it's provided directly to
9 counsel. So there is not the issue with us getting
10 the discovery from Mr. Aoki. But there is the issue
11 of our clients not having the opportunity to really
12 sit down and review it on their own, which I think is
13 critical to preparing for trial, and critical to the
14 other issue that I want to raise with the Court,
15 which is the scheduling order.

16 Because I think being able to review that
17 discovery on their own, the clients individually, and
18 then sit down with us and talk about what are the
19 steps we need to take, in order to do the
20 investigation we need to do and obtain, for instance,
21 discovery that we need to produce as part of our
22 obligation for reciprocal discovery, the motions we
23 need to file, and that sort of thing, all gets bogged
24 down because of the lack of our clients having their
25 discovery, and being able to review it on their own,

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1 reflect on it, without counsel there. You know, as
2 you can imagine, when we're there with our clients,
3 there is a lot of other things we're talking about.
4 And they don't necessarily have the time to sit and
5 review the discovery, which is, for Mr. Perez, the
6 only opportunity he ever has is when myself or
7 Ms. Fox-Young or another one of our staff are there
8 with him to review discovery.

9 And I know the Court entered a scheduling
10 order with the March trial date in mind. And I
11 assumed, hopefully correctly, that those dates would
12 change along with whatever our new trial date is.
13 There was a proposed scheduling order submitted via
14 the email, the defendants had spent a great deal of
15 time putting together, and has quite a bit more in
16 terms of dates and anticipating hearings and things
17 like that, that I would ask the Court to reconsider
18 imposing. And that scheduling order had deadlines
19 that weren't a specific date.

20 So, for instance, it would be that the
21 first was a Government's discovery deadline, 240 days
22 before trial. The Government's expert witness
23 notices, and some discovery motions 220 days before
24 trial. So it wasn't set to a particular date. It
25 was set to whenever the Court would set the trial.

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1 I don't know that there is necessarily
2 agreement among all the defendants about --

3 THE COURT: But that was the defendant's
4 order, wasn't it?

5 MR. VILLA: No. The proposed scheduling
6 order there was agreement. What I'm saying now is I
7 don't know that there is agreement about when to move
8 the trial date. I imagine the Court has in mind when
9 it wants to do it, basically.

10 THE COURT: Well, I feel some commitment to
11 the folks yesterday. I mean, some of those guys
12 consented, so they wanted to help y'all out by moving
13 their trial. But they wanted to get it done. So I
14 want to get it done before November 6, so that I can
15 start that trial.

16 MR. VILLA: So you're saying you want to
17 schedule this trial before November of 2017?

18 THE COURT: Right.

19 MR. VILLA: Okay. And I don't know, as
20 Mr. Perez is charged in Counts 6 and 7 along with
21 eight others -- I can't speak for all of them, I can
22 speak for Mr. Perez -- that I think that's plausible.
23 And I'm assuming some things like severance and other
24 issues are going to sort out when others involved in
25 this indictment may have their trial. But I can't

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1 speak for everybody in terms of whether they prefer
2 trial before November or after. I know that there
3 are some that would rather have their trial after
4 November 2017. And I think there is good reasons, in
5 addition to what I've already stated. It doesn't
6 involve our Counts 6 and 7. That count was --
7 occurred in 2014. There was a -- essentially, on the
8 eve of a state trial, when the indictment came. And
9 so I think our case might be a little more teed up,
10 if you will, for trial. But some of the other counts
11 are -- date back to 2001 -- would involve
12 significantly more investigation and work.

13 And so I don't speak for everybody when I
14 say that a trial prior to November 2017 might be okay
15 for Counts 6 and 7. But I do think that I would ask
16 the Court to impose the proposed scheduling order
17 that defendants submitted, or some variation of that,
18 depending on when the Court actually does set the
19 case for trial. Or if the Court wants to stay with
20 the scheduling order that it imposed for the March
21 trial date, that we move those dates accordingly,
22 depending on when it sets the trial.

23 So if you set the trial in the summer of
24 2017, that would be moving it, say, four months.
25 Then we would need to move the other dates another

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1 three or four months. And there are some other dates
2 that I think we've all thought of that may need to be
3 added. I'm not sure we can resolve that today. We
4 can potentially do that down the road.

5 But those are my concerns, Your Honor.

6 THE COURT: All right. Thank you, Mr.
7 Villa.

8 I probably need to hear from the Government
9 here. But anyone else want to say anything?

10 Mr. Hammond?

11 MR. HAMMOND: Your Honor, two points. One,
12 on the tablet question you asked about, I did contact
13 Mr. Aoki's office yesterday, and they advised me that
14 as to a large number of tablets, including my
15 client's, Mr. Montoya, the tablets had not yet come
16 back from the Department of Corrections. We've been
17 told that they were expected any day, but have not
18 yet been received. When they are received, Mr.
19 Aoki's staff says they can load the remaining
20 discovery that they now have on the tablets, and send
21 them back. How long that will take really depends,
22 first of all, on when the tablets are actually
23 delivered. And, as of yesterday, they had not been.
24 I would expect that, at the very best, if we had the
25 tablets in Seattle now, we might have them loaded and

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1 sent out to the defendants sometime in the next
2 couple of weeks. But we've had numerous delays here.
3 And my recommendation is that we not start the
4 scheduling order deadline until we, in fact, have
5 those tablets back, and the Government has said that
6 it's through making its discovery.

7 Several lawyers here worked together to
8 draft the scheduling order that Mr. Villa mentioned.
9 And we started it with the idea that we could
10 accomplish most of the things that need to be
11 accomplished in eight months, in 240 days, which I
12 think is also about the same time schedule that the
13 1613 people had suggested. But that begins with the
14 date that the Government concludes its discovery,
15 and, presumably, our clients have it so that they can
16 review it.

17 So our suggestion would be, at the least,
18 that we not set a date until we know that the
19 discovery has been loaded and received by the
20 clients, and that we then impose a scheduling order
21 that works from that 240-day period backwards. And I
22 think, if all of those things happened, we probably
23 could accommodate a trial that might appear -- that
24 might occur before the 1613 trial. There are a lot
25 of moving parts in that. But I think at least that's

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1 a decent starting point.

2 THE COURT: All right. Thank you, Mr.
3 Hammond.

4 Anyone else? Mr. Davis?

5 MR. DAVIS: Thank you, Judge.

6 Michael Davis on behalf of Carlos Herrera.

7 Judge, I typically proceed in a hearing like this
8 with the notion that you can't put a foot in a shut
9 mouth. But I feel like I should at least alert the
10 Court to some concerns I have with a trial setting in
11 this matter within the next year involving Carlos
12 Herrera.

13 As the Court may know, I was -- Mr. Herrera
14 was brought in late in 4268, and I've been on the
15 case for about five-and-a-half months now. He just
16 got his tablet last week. So an attempt to go
17 through the discovery has been extremely difficult
18 and cumbersome for us, primarily because he is not in
19 the Sandoval County Detention Center, which is 15
20 minutes from my office; he is in the Otero County
21 prison facility, which is 300 miles from my office.
22 So it's difficult for me to get down there to see him
23 more often than two times a month. When I go to see
24 him, those meetings are difficult. Because Mr.
25 Herrera has been in prison for 17 years; as a

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1 consequence, he has a wealth of information regarding
2 most of what has been alleged in the indictment. And
3 there are literally hundreds of players with a
4 variety of nicknames that make it difficult to follow
5 some train of thought with regard to developing a
6 defense in this case.

7 Additionally, with regard to Mr. Herrera
8 he's charged in Counts 6 and 7, the same counts with
9 Mr. Villa's client, Mr. Perez, involving the death of
10 Javier Molina. It's also clear that Mr. Herrera was
11 not directly involved in the death of Javier Molina,
12 because he was in an adjoining cell block, A pod.

13 So we've been trying to put together the
14 Government's evidence against Mr. Herrera. And it's
15 extremely difficult when we don't have access to our
16 client like we normally would. He was initially at
17 Torrance, when we first got in the case, and shortly
18 after the first hearing we had in the case, in June,
19 he was transferred in Otero County. And I'm
20 perfectly willing to go and visit him. But I wanted
21 to alert the Court to sort of the unique situation we
22 face with Mr. Herrera. I can tell you that, since he
23 got his tablet, I haven't had a chance to meet with
24 him. I hope to go down and see him next week, to
25 start going through stuff. He's sat here next to me

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1 and immediately started going off and giving me lots
2 of information, because it's the first chance he's
3 had to at least start going through the tablet.

4 So that process, at least with regard to
5 Mr. Herrera, is going to take considerable time for
6 us to go through everything.

7 So I just ask the Court to appreciate the
8 logistics of the discovery issue in the case. It's
9 not just the wealth of the discovery; it's not just
10 the issues that Mr. Hammond raised. It's a matter of
11 the practical ability to meet and confer with our
12 clients, and then follow up with information he gives
13 us to my investigative team, my co-counsel, so we can
14 follow up with that, and hopefully, prepare a good,
15 adequate defense for him.

16 So I just wanted to alert the Court to
17 those matters.

18 THE COURT: All right. Thank you, Mr.
19 Davis.

20 Anyone else before I hear from the
21 Government?

22 Mr. Castle?

23 MR. CASTLE: Yes, Your Honor. Just so -- I
24 think the Court is contemplating very clearly that
25 4268 trial ought to proceed after 1613.

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1 THE COURT: Well, that's what I want to
2 talk to the Government about. I guess everybody --
3 it's always been set before the other one. Yesterday
4 we were working under that assumption. But, you
5 know, I guess I need to explore that assumption. But
6 I think you're right. I think everybody has been
7 working under that assumption.

8 MR. CASTLE: And I wanted to give the Court
9 some thoughts in regards to that. 1613 has 12
10 defendants; I believe there is 4 counts. Obviously,
11 there is numerous overt acts that are charged. This,
12 4268, has over twice the number of defendants. The
13 amount of discovery is also double what it is in
14 1613.

15 In the last month and a half since we were
16 last here, the DeLeon case, the 4268 case, received
17 10,227 pages of new discovery, and 99 additional
18 audiotapes. In the Baca case, they received 1/5 of
19 that new discovery, in page numbers.

20 The case against these defendants in this
21 particular indictment is extremely complex, and I
22 think that's been described before. But we're going
23 to have numerous issues concerning admissibility of
24 co-conspirator statements, disclosure of informants.
25 For example, I think I told the Court last time that

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1 there was at least 376 separately identified sources
2 of information, or informants, whatever you want to
3 call it, some type of non-law enforcement providers
4 of information. The vast majority, over 90 percent
5 of those individuals have not been identified.

6 Just to file motions to disclose those
7 informants would take reams and reams of paper. And
8 I believe that my analysis is that almost all of
9 these individuals provide exculpatory information, at
10 least with regard to one or more of the defendants.
11 For example, there will be people that will
12 describe -- who are members of the SNM organization,
13 and they won't mention three or four of the
14 defendants or more in this indictment. In my
15 opinion, that would be exculpatory with regards to
16 those three or four defendants.

17 So the amount of litigation that has to
18 take place between now and when we proceed to trial,
19 I think, is going to be enormous. And I think we've
20 only seen the tip of the iceberg on it. And because
21 this case has so many defendants and so many -- what
22 I believe would be subconspiracies, different overt
23 acts, different distinct criminal episodes, we're
24 going to have -- basically, this is the tip of the
25 iceberg in litigation.

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1 And so I think -- well, at least our
2 opinion is that we're not going to be prepared to
3 proceed in this calendar year. It would be nice to
4 do so, but I don't believe that's realistic. Now, if
5 the cases were severed, there might be individuals
6 that could proceed to trial earlier than that, such
7 as Mr. Villa suggested with regard to his client.

8 But for our client, for example, we have to
9 investigate two homicides that happened 15 years ago.
10 And right now we're not being provided with the
11 identities of witnesses and things of that nature,
12 because the Government is relying upon the Jencks
13 Act, and not disclosing that. That makes our job
14 much more difficult.

15 I can tell the Court the last disclosure
16 that we received is on November 14 of this year. My
17 review of the disclosure to date -- I believe there
18 is more to come, because what was promised to the
19 parties and the Court previously has not all been
20 disclosed. And I'm not blaming them. They,
21 obviously, took on a large production agreement when
22 we were last here. It's just, I think that we're
23 going to see more and more materials. And until -- I
24 join Mr. Hammond, until we see what all those
25 materials are, it might be premature to decide on a

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1 date.

2 THE COURT: All right. Thank you, Mr.
3 Castle.

4 MS. HARBOUR-VALDEZ: Your Honor, I just
5 received an email from Mr. Aoki on the status of the
6 tablets, if you'd like me to update the Court.

7 THE COURT: You may.

8 MS. HARBOUR-VALDEZ: Mr. Aoki says that 15
9 defendants currently have their tablets at their
10 facilities. His office received six reconfigured
11 tablets back from the Department of Corrections
12 yesterday. Five of those have been loaded with
13 discovery and are being shipped out today; the
14 facilities should receive them on Friday. One of
15 them had an error message pop up when they tried to
16 copy the discovery on it, so it was shipped back to
17 the Department of Corrections. The Corrections
18 Department still has 17 other tablets they are
19 reconfiguring. They are continuing to send them to
20 Mr. Aoki on a rolling basis, six at a time.

21 So that's the status now. I don't know why
22 the rolling basis. Maybe the Department of
23 Corrections could answer the Court's questions on
24 that.

25 THE COURT: All right. Thank you, Ms.

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1 Harbour-Valdez.

2 All right. Anything before we hear from
3 the Government?

4 MR. LOWRY: Your Honor, briefly.

5 THE COURT: Mr. Lowry?

6 MR. LOWRY: Your Honor, I'd like to echo
7 the comments that my colleagues have made today,
8 especially Mr. Hammond and Mr. Davis' points. One, I
9 don't think -- well, I know that the Government
10 hasn't finished producing Rule 16 discovery to date.

11 During yesterday's hearing, you heard the
12 Government testify about intercepted jailhouse calls
13 with my client, and although I think a single call
14 has been produced, obviously those would all be
15 statements of my client that have yet to be produced,
16 along with other categories of evidence that I'll go
17 over with the Government later. But my concern is
18 equivalent with Mr. Hammond's, that we really haven't
19 finished the initial disclosures from the Government.
20 And like Mr. Davis, my client is in Las Cruces; he's
21 3 hours away from my office. And even when we get
22 there, we're put in a multipurpose room, where we
23 have to vacate that room for magistrate court
24 hearings every day. So it makes for a very choppy
25 visit. And it's complicated and lengthy to make that

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1 happen. And we try to make that happen with
2 regularity, but it's just going to take a lot of time
3 to digest the material.

4 Complicating that is my client has probably
5 had his tablet in the past for -- I think I'm being
6 generous when I would suggest 30 days. But as you
7 can imagine, my client has been incarcerated for a
8 number of years, and his familiarity with technology
9 is very minimal. And given that, he inadvertently
10 started deleting the discovery off of the tablet, and
11 frankly, got so concerned that he would lose all of
12 it, he quit using the tablet until we could get down
13 and instruct him. And we're waiting for the tablet
14 to get back to him, and that hasn't happened.

15 And so I would share my colleagues'
16 concerns that, given the volume of material we need
17 to go through, it's just going to take an inordinate
18 amount of time to do that. And I'm concerned that,
19 as Mr. Castle said, the next calendar year may not be
20 sufficient to complete the review of discovery, and
21 then the accompanying litigation that's going to be
22 precipitated out of that review.

23 Thank you, Your Honor.

24 THE COURT: All right. Thank you, Mr.
25 Lowry.

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1 Anyone else from the defendants before we
2 hear from the Government?

3 All right. Ms. Armijo?

4 MS. ARMIJO: Your Honor, we had agreed to
5 the continuance in this case that Mr. Villa
6 presented, if the other case, the Baca case, was
7 continued, and that's why we had agreed to the
8 continuance of the Baca case and we had agreed to the
9 continuance in this case. And our understanding was
10 at the time they were just asking that it be
11 continued to next summer, 2017.

12 Hearing now that they don't want to try
13 this case until the year 2018, or that they want Baca
14 to replace the DeLeon matter is, frankly, quite
15 surprising. The Baca case, although it has fewer
16 defendants, it has three overlapping defendants; it
17 has 240 overt acts. It has several murders that we
18 have charged in this case as predicate overt acts in
19 that case, which we will need to prove along with
20 numerous other incidents.

21 So by no means is the RICO/Baca case a walk
22 in the park in comparison to this case. So -- it was
23 indicted several months afterward. And our position
24 is that this case should go before the Baca case.
25 With the exception of -- we could talk about what we

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1 refer to as the 4269, the PNM case. It has -- four
2 defendants are here. It occurred in Santa Fe. I
3 guess I would like to know what the positions are of
4 the attorneys of that case. Mr. Calvert is here for
5 the first time. I would like a trial date set in
6 that case as well.

7 As far as the rolling discovery, as you
8 know from the last Court hearing that we had, we had
9 defense motions where they requested STIU files; they
10 requested recordings, STIU files -- and what was
11 other bulk -- there was very specific things that
12 they had requested, that we had agreed to go ahead
13 and give, and that was the bulk of that discovery,
14 and we've been working very hard on it.

15 As the Court indicated, the vast majority
16 of the discovery is out, but discovery is going to
17 keep going on. We're not going to hold on anything.
18 If it's Brady materials, we have to disclose it right
19 away. We are continuing to serve search warrants in
20 this case. Yesterday we served a search warrant on
21 one of the defendants that was in court. Obviously,
22 we're going to disclose that. We anticipate serving
23 another search warrant on a defendant that was in
24 court yesterday. We have other people -- we are
25 continuing to investigate this. We're continuing to

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1 monitor jail calls. So discovery will be on an
2 ongoing, rolling basis as we get things. But the
3 vast majority -- Mr. -- I'm trying to see if I have
4 the date -- I know that the calls that were referred
5 to yesterday in the hearing regarding Mr. Baca have
6 long ago been disclosed. I will get that date and
7 provide it to him a little bit later.

8 But we have disclosed all of those items.
9 We've disclosed thousands of pages. So discovery is
10 going to keep happening. The issue as far as the
11 discovery order, the discovery, when we were last
12 here, I believe Ms. Sirignano had said that she was
13 going to get with the United States that day and
14 provide what the defense had wanted. I never heard
15 from her at all on that issue.

16 So the United States provided, as the Court
17 had required, on the deadline discovery orders that
18 we had worked out with Ms. Duncan as far as dates and
19 what was needed. Obviously, Ms. Duncan could not get
20 approval from the defense. But that is -- what the
21 United States submitted was something that we had
22 been working with a representative from the defense.

23 Their discovery order says the
24 Government -- from the Government's deadline 240
25 days. It's just not workable. That's eight months.

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1 That's even past July of next year, if I'm correct,
2 or just about -- to start the scheduling order.

3 So -- oh, that was the majority thing they
4 had wanted at the last court hearings. I'm sorry, I
5 was having a blank. They had wanted all the old FBI
6 files, for us to go through. And that was done. The
7 FBI came down to Las Cruces, and we went through
8 banker boxes. And so a lot of old files were
9 produced at their request. We don't think they were
10 relevant, we don't think that they were necessary.
11 But based on the Court's ruling and our agreement, we
12 went ahead and did that, and that's the vast majority
13 of the discovery that was also sent recently.

14 So we would request that the Court set a
15 trial date; that it is as we had initially discussed,
16 next summer; that we can change the dates to reflect
17 that new date on the discovery order that's already
18 in place. In this case, which has a defense deadline
19 for reciprocal discovery. And the defense should
20 know that discovery is going to be ongoing, as we get
21 things, or as they make requests. There is another
22 motion today -- well, I think a couple motions
23 today -- regarding discovery. So that is where we
24 stand, Your Honor.

25 I cannot speak to the tablets, because that

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1 is something that we're left out of. Today I'm
2 hearing for the first time that there are issues
3 again. So we're not involved with Mr. Aoki, and how
4 the discovery has gone, or anything else. I know
5 that we were involved a little bit with regard to Mr.
6 Gallegos -- or Mr. Garcia, I should say -- in regard
7 to his tablet, given that he had had a trial date
8 that was November 30 at the time. But other than
9 that, the United States has kept out of it. So we
10 really don't have anything to say as far as that.

11 THE COURT: The number the people keep
12 giving me, there has been about 40,000 documents
13 produced. Is there going to be any more production
14 by the Government of anything, say more than 1,000
15 pages, other than what may be ordered or required in
16 the future, or on an ongoing basis? I'm not talking
17 about telephone calls, future search warrants. But
18 do you plan any sort of large document production?
19 And I'm defining it myself as 1,000; it might be
20 something else. But do you expect to have any other
21 large document drops?

22 MS. ARMIJO: No. What I would anticipate
23 is things that we have from these motions, jail
24 calls, continuing search warrants, or interviews.
25 And I mean, if the defense wants us to hold off on

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1 things, which I don't think they do, we can certainly
2 hold off for big drops. But basically, now, as we
3 get things, we're disclosing them.

4 And one other point about the discovery.

5 To say that the Baca discovery is far less is really
6 not true. Because a lot of the discovery in Baca was
7 already disclosed in DeLeon, because we have a lot of
8 the overt acts that are charged in DeLeon that are
9 charged in Baca. So, as this Court knows, discovery
10 in all the cases, including Mr. Garcia's case,
11 including in the PNM case, the 4269, it's going to
12 all parties here. And so just because one case
13 number has significantly more doesn't mean it's not
14 related to the others, especially given the
15 racketeering nature of the case.

16 THE COURT: How long do you think this
17 trial is going to take?

18 MS. ARMIJO: Well, it depends on severance
19 and other issues. But I would assume, probably when
20 we sort things out -- and I would anticipate some
21 people pleading guilty -- I would say two months.

22 THE COURT: So you're basically requesting
23 a trial no later than starting in September?

24 MS. ARMIJO: Correct. And what I had been
25 anticipating was July, since we had vacated the July.

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1 But yes, that is correct.

2 THE COURT: So this is just fill-in for the
3 Baca case?

4 MS. ARMIJO: That was my initial
5 understanding, when we had originally talked is that
6 they had wanted to bump them. And that's why I
7 brought up the issue yesterday. Certainly, we can
8 start in August. But we want to build in a little
9 bit of time, because I don't know, but the
10 Government -- three attorneys here are also in the
11 Baca case.

12 THE COURT: All right. Anything else, Ms.
13 Armijo?

14 MS. ARMIJO: No.

15 THE COURT: How about from the defendants?
16 Anything else anybody want to say on this?

17 All right. Mr. Villa?

18 MR. VILLA: Your Honor, I perhaps should
19 have mentioned this when I was first up here, but
20 just by way of example with respect to the discovery
21 that I'm more familiar with, the Javier Molina
22 murder. On October 18, 2016, the Government produced
23 to Mr. Aoki, which then later gets produced to us, a
24 number of documents, maybe 100 documents or so, that
25 I would classify as something that I think the

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1 Government would have had in their possession prior
2 to the indictment in this case, or at least the
3 superseding indictment in this case, which brought in
4 Mr. Perez and some of the others. And so, for
5 instance, there were 15, 16 audio and body recordings
6 of -- allegedly of Mr. Herrera and Mr. Perez, my
7 client, recorded by a confidential human source. And
8 based on the other discovery that I've reviewed, and
9 what can be heard from some of these recordings, I
10 believe that this information was in the Government's
11 possession before they indicted my client, and
12 perhaps one of the reasons why they indicted my
13 client.

14 And I can't speak for why it wasn't
15 produced prior to October 18, 2016. But I guess
16 that's the concern I have is, you know, what else is
17 out there? When are we going to get it? And I think
18 that was part of the reason why we requested at the
19 time we filed the motion and discovery scheduling
20 order. You know, I think, if you piece this case by
21 the different counts, we might be able to have a more
22 reasonable idea, for instance, when the discovery is
23 going to be due, or when we can try the case. And
24 that depended on severance and that sort of thing.

25 But there never really was an agreement, at

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1 least on my part when I filed the motion, that this
2 case's trial would be contingent on 1610's trial.
3 That was what Ms. Armijo conveyed to me that she
4 wanted, was essentially an agreement that, if 1610
5 moved, we would move. And that agreement was not
6 something we were willing to do. And that's attached
7 in an email in my motion; essentially, we weren't
8 going to make our continuance contingent upon theirs.

9 That's all I have, Your Honor.

10 THE COURT: All right. Thank you, Mr.
11 Villa.

12 Ms. Sirignano?

13 MS. SIRIGNANO: Your Honor. Just briefly.
14 I presented the Government with an 18-page discovery
15 letter in Mr. Garcia's cases, both in 15-CR-4275,
16 15-CR-4268, and 16-CR-1613. And the Government did
17 state today that they're producing discovery in all
18 three cases, and that we all have it. And this
19 herein lies the -- by and large the biggest problem
20 that all of us are having, is the way that the
21 Government is putting these productions together.
22 Because, as the Government has stated, some of these
23 cases are predicate acts for the RICO case in 1613.
24 So it's not evident from their productions and their
25 discovery letters which documents go for each count

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1 in, say, 4275 or 4268, and they also apply to the
2 overt acts in 1613.

3 And so it's not that Mr. Aoki or the
4 Department of Corrections has any control over it.
5 It's the way that this is all being produced and
6 commingled that is requiring us, as counsel, to go
7 through this with the clients, and make sure that we
8 have all the evidence relevant to each count, each
9 predicate act, and of course each overt act in the
10 indictment.

11 Also, I just want to briefly say that I
12 don't think I'm the only one that believes that this
13 tablet situation isn't working. Clearly, Your Honor,
14 it's not. This was a requirement from the
15 Government, back before Judge Gonzales early on in
16 this case, based on their theory of safety, and the
17 co-defendants passing information among each other.
18 Their solution was to have these tablets. There was
19 delay in obtaining the tablets. There was delay in
20 the 1613 people receiving their tablets, based on
21 budgetary constraints. We were told July of this
22 year; then August. Here we are in November. For the
23 Government to stand up and say, Hey, we don't have
24 any control over this, this is Mr. Aoki and the
25 Department of Corrections, it just seems a little bit

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1 concerning to us that we're having to make hard
2 copies of things that we get from the November
3 productions, going to the jails, spend the time,
4 allow our clients to look at the new production, and
5 then they're still waiting and waiting for tablets.

6 Your Honor, I don't know what the solution
7 is here. This was something the Government wanted to
8 assuage any safety concerns. Then their argument
9 recently was that the clients are sharing tablets
10 with each other. There is nothing in the protective
11 order that says that they can't show their colleagues
12 or their co-defendants their tablets. There is
13 nothing wrong with that. They're sitting around
14 waiting for discovery. And so I would just like to
15 propose -- have the Government come up with a
16 solution, since this tablet thing is completely
17 delaying the whole process here. Thank you.

18 THE COURT: Thank you, Ms. Sirignano.

19 Anyone else from the defendants? All
20 right. Well -- Mr. Davis?

21 MR. DAVIS: Just trying to be brief. I
22 forgot to mention, because of the protection order
23 when I go down to visit Mr. Herrera, I can't give him
24 a stack of documents and say, Review these, and when
25 I come back in two weeks, we can go through it. I

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1 can't do that. So I have to -- and my investigative
2 team -- take documents down there and try and make
3 sense of allegations that are made in certain of
4 those documents. It's just very cumbersome.
5 Obviously, it's daunting. It's an exhausting
6 experience. It's difficult to spend more than four
7 or five hours doing this at one time. So,
8 logistically, it's just difficult, and it's very
9 difficult.

10 Additionally, I want the Court to know that
11 this discussion we've been having about volume of the
12 discovery and the problems, that's just the stuff
13 that we get from the Government.

14 Once, in the course of this case, the
15 investigators for all the defendants in this case, we
16 learn who the CIs are, who they may be, we're going
17 to be asking for Rule 17 subpoenas, doing our own
18 investigation, acquiring our own documents. It's
19 going to take time to obtain those materials, get
20 them back, figure out how we want to use those
21 documents. They may be offense reports, they may be
22 court transcripts, there may be witness testimony,
23 there may be witnesses involved in the cases that the
24 CIs were involved in that we may want to interview
25 and call as witnesses. That's going to take a

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1 tremendous amount of time.

2 So it's not just a matter of getting the
3 discovery in a usable manner from the Government.

4 And I appreciate Mr. Castellano and Ms. Armijo's
5 situation with regard to the volume of the case. But
6 I just alert the Court to these matters and I ask the
7 Court to take that into account when you're
8 considering scheduling a trial next year in this
9 case. I just don't believe that that's going to be
10 possible for the defendants in the case to properly
11 prepare the case.

12 THE COURT: All right. Thank you, Mr.
13 Davis.

14 Anyone else?

15 Well, I do think the Government's consent
16 here to move this trial is premised on the fact that
17 we're sliding Baca back, and DeLeon is going to move
18 forward and sort of take its place. So I think we
19 had that much of agreement. And I realize people
20 want different things, and I may have to deal with
21 that down the road. But I'm not inclined to put this
22 in orbit and not set a trial date. I'm not inclined
23 to undo the scheduling order that we had so much
24 difficulty getting in place.

25 So I'm going to set the trial July 10th.

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1 All the problems that you're telling me, I realize
2 are out there. I'm reading them. I'm hearing about
3 them. Not just in this case, but the others.
4 Everybody will have to work extremely hard to make it
5 take place. And if we get to the point where it
6 can't take place, we'll deal with it at that point.
7 But I do think that we need to stick with the
8 schedule that we hammered out in this case, hammered
9 out in Baca, and take the agreement that we have, and
10 see if we can try to move this case along.

11 Did you have other deadlines that you
12 wanted to try to impose, or are you comfortable with
13 the scheduling order that we have? Do we need
14 anything else, Ms. Armijo?

15 MS. ARMIJO: Your Honor, I would just
16 request that -- and the United States will submit
17 that same scheduling order that you have, but with --
18 to reflect the new dates on it. The defense deadline
19 has come and gone as far as defense disclosure. We
20 haven't received anything. We know there is stuff
21 out there, at least in the Molina case, because as
22 has already been indicated, that's on the eve of
23 trial. And we know they've done interviews. And we
24 believe that there should be -- well, we know from --
25 counsel in previous hearings have said that they had

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1 documents that we didn't have, and yet, we didn't
2 receive anything. So we would just -- we'll provide
3 the Court with a new scheduling order with the dates,
4 but the same substance.

5 Your Honor, as far as 4269, does the Court
6 want to set that trial as well? I don't think we've
7 heard from those attorneys as to when they would want
8 a trial date in that case.

9 THE COURT: All right. Well, what are you
10 thinking? How long is that trial going to last?

11 MS. ARMIJO: Your Honor, that trial is only
12 two incidents that occurred up at PNM. One of the
13 defendants has already pled, so it's basically -- I
14 should say three defendants remaining in that case.
15 I don't think that case would take longer than two
16 weeks, possibly even less.

17 THE COURT: All right. Given the schedule
18 that we now have, when are you proposing that we set
19 that trial?

20 MS. ARMIJO: If we start this one July,
21 maybe set the other one the beginning of October.

22 THE COURT: All right. Let me hear from
23 the defendants in that case. Mr. Calbert, let me
24 hear from you -- Ms. Stillinger, if you want to go
25 ahead.

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1 MR. BAKER: Your Honor, the October date is
2 fine. I just echo some of the concerns. My client
3 has only had his tablet for a few weeks at most,
4 maybe a month. And absent his ability to look at
5 discovery, I just reserve the right to raise this
6 objection. It affects his ability to go forward.
7 Otherwise, October is fine. We can set it for a firm
8 date. We're good to go.

9 THE COURT: All right. Ms. Stillinger?

10 MS. STILLINGER: Your Honor, Mary
11 Stillinger for Mr. Varela. And I think October would
12 work fine, assuming that the July date is when we go
13 on the 4268. I would echo some of the concerns
14 previously raised about whether it would actually go
15 then. But I would like to have, I guess, agreement
16 on the order that 69 would go after 68, so we know.
17 I think the Government agrees with that. And that's
18 the order we would like it in, so we know what we are
19 preparing for first. And I think that distance
20 between the trials would be appropriate.

21 THE COURT: All right. Anyone else in --
22 I'm calling the Varela case? All right. October 2,
23 set it for October 2.

24 Did you have anything else you need on
25 that, Ms. Armijo --

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1 MS. ARMIJO: No, Your Honor.

2 THE COURT: -- on status conference portion
3 of the Varela case?

4 MS. ARMIJO: No, Your Honor.

5 THE COURT: Okay.

6 Let me address a little bit more
7 Mr. Hammond's comments about -- and I know it was
8 joined in by Mr. Castle and others -- I think to try
9 and set a trial date only when we get done with
10 discovery in a case like this, or almost any case, is
11 just not realistic. There is going to be -- you
12 know, if I just got United States v. John Doe,
13 oftentimes on Friday, I'm dealing with -- before the
14 Monday trial -- I'm dealing with new discovery
15 issues, discovery issues at almost every pretrial
16 conference. It's just part of litigation and getting
17 ready for trial. And so I think to push it back
18 until all discovery is done, we are going to have --
19 looks like search warrants continuing; it looks like
20 we'll always have telephone calls at the jail. It's
21 just never going to probably end. So I think to wait
22 to that point to set trial dates, it's not realistic.
23 And it's not what we do in other cases, so I'm not
24 inclined to do it here.

25 Obviously, if the Government starts

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1 dropping on 40,000 documents -- but my sense is that
2 they are pretty much done, other than what I may
3 order them to do in addition to what they've done.
4 They've obviously made some decisions with
5 redactions, CIs, and things like that, that are going
6 to be litigated. And so they may have to get some
7 more information along those lines, but that the big
8 bulk of stuff is out there. So it's on that basis
9 that I'm setting these deadlines.

10 All right. Did you want to say something
11 else, Mr. Villa?

12 MR. VILLA: Please, Your Honor.

13 THE COURT: Mr. Villa?

14 MR. VILLA: Thank you, Your Honor.

15 I just want to address the scheduling
16 order. I respect the Court's decision with respect
17 to the July trial date, and I understand it. But the
18 scheduling order that was entered it -- this is
19 Document 759, November 4, 2016 -- I understand the
20 Court wants to stick with that, given the problems we
21 had in agreeing. But what I would ask the Court --

22 THE COURT: It always helps to agree,
23 because if you wait for the Judge to decide stuff --

24 MR. VILLA: So what I would ask the Court
25 to do is, this scheduling order has deadlines

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1 anticipating a March trial date. And so all I'd ask
2 that the Court do at this juncture is to move those
3 dates --

4 THE COURT: I think Ms. Armijo says she's
5 going to send you an order.

6 MR. VILLA: Okay. So I just wanted to
7 clarify that; that all of the dates in the scheduling
8 order would be moved?

9 THE COURT: Well, they're not moved right
10 now. So if you have reciprocal obligations, they're
11 still in place.

12 MR. VILLA: Well -- and that's the concern
13 I have. We can oblige with our reciprocal
14 obligations -- I didn't say that right -- but, for
15 instance, the current scheduling order, December 5,
16 2016, has a scientific expert witness notice as to
17 reports.

18 THE COURT: Well, I encourage you to get
19 together pretty quickly and try to give me some new
20 dates.

21 MR. VILLA: What I'm asking, Your Honor, is
22 we would just move those, the same way we move the
23 trial four months.

24 THE COURT: Get with them and move them.

25 MR. VILLA: Is that something you want us

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1 to do? You don't want to resolve that today?

2 THE COURT: Well, you know, the problem is
3 that everybody leaves here and they promise me a lot
4 of stuff, and I never get things. So it seems like
5 you've got a deadline, maybe I'll get some stuff.

6 MR. VILLA: No, I understand that, Your
7 Honor. I'm just thinking that, given the concerns
8 that we've raised with discovery, just giving us the
9 notice -- I mean, for instance, if we move everything
10 by four months, we're under an obligation; we know
11 what it is now, and we can stick to that. And that
12 is consistent with the same continuance that the
13 Court is granting for the trial date.

14 THE COURT: Well, does the Government want
15 to just move everything four months?

16 MS. ARMIJO: We can. We can do that. I
17 don't have a calendar right now, so I don't know if
18 moving something four months, if you go by the date,
19 will be on a Sunday or not. But other than that,
20 yes, that's fine. I was going to have my paralegal
21 start working on it immediately.

22 THE COURT: Is everybody in agreement with
23 that? Everybody move it four months?

24 MR. VILLA: We can live with that, Your
25 Honor, on behalf of Mr. Perez.

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1 THE COURT: All right. So we're going to
2 start moving them four months. Everything that's in
3 November, I guess will be due -- December, January,
4 February -- March. So the reciprocal discovery will
5 be due on March 18, which is a Saturday, so we'll
6 make it March 20. The December dates will be April.
7 The scientific expert will be April 5th. The
8 responses to Rule 16 discovery will be April 19. The
9 responses to scientific expert witness notice we will
10 now move into May -- will be May 3rd, which is a
11 Wednesday. The Rule 12 pretrial motions, Daubert
12 motions, the Government's notice of gang experts will
13 be May 9th, which is a Tuesday. The responses to
14 pretrial and Daubert motions, defendants' notice of
15 gang experts, notices of defenses pursuant to Rules
16 12.1 and 12.3, will be March 23, which is a Tuesday.

17 Now, we're moving into June. The responses
18 to notices of defenses, motions in limine, Federal
19 Rule of Evidence 404(b) notices, jury instructions
20 proposed voir dire will be June 6, which is a
21 Tuesday. Responses to motions in limine, objections
22 to jury instructions, and proposed voir dire will be
23 now June 21, which is a Wednesday. And we have now
24 the jury selection and jury trial set for July 10th.

25 (A discussion was held off the record.)

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1 THE COURT: Okay. Ms. Wild is telling me I
2 gave a March date, when it should have been a May
3 date, I think. So the date for the responses to
4 pretrial and Daubert motions will be March --

5 THE CLERK: May.

6 THE COURT: -- May 23 -- I keep trying to
7 make that March -- so May 23, 2016. And Ms. Wild
8 will prepare an order and she will enter it.

9 All right. Anything else on that, Mr.
10 Villa?

11 MR. VILLA: No, Your Honor. Thank you.

12 THE COURT: Anything else we need to do on
13 that, Ms. Armijo?

14 MS. ARMIJO: No, Your Honor. Thank you.

15 THE COURT: All right. What time of day is
16 it here? That clock is hard to read.

17 All right. Let's go -- we can go two
18 things. We can go to the easy thing, which I think
19 is this prison visit that we got, which I don't think
20 will take too long. Or we can start plunging in -- I
21 want to take a break in about 20 minutes -- we can
22 start plunging into the joint motion for disclosure
23 and production of the CI, which I think is going to
24 be a little bit more complicated issue.

25 Let's see. Mr. Villa, are these both your

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1 motions?

2 MR. VILLA: Actually, Ms. Fox-Young will
3 argue those, Your Honor.

4 THE COURT: But are they both your motions?

5 MR. VILLA: Yes, Your Honor.

6 THE COURT: Which one do you want to argue
7 first then?

8 MR. VILLA: I think we can handle the
9 prison visit. The CI motion, we have agreed to
10 resolve that --

11 THE COURT: I understand that; that's the
12 reason I think it's a little more complicated with
13 the others.

14 Well, let's take up the -- let's go ahead
15 and get started with the CI motion, unless you want
16 to do the other one. Do you want to do the other one
17 first?

18 MR. VILLA: I think that makes sense.

19 THE COURT: All right. Well, let me say
20 this on the visit: If this were being done -- let's
21 say you had a stack of documents over at your
22 offices, and you wanted somebody to come over and
23 look at them, sometimes it's normal to have somebody
24 set in there, and maybe look at it, you know, make
25 sure nothing is stolen. Although, among counsel, you

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1 know, I used to trust the people that I was working
2 with, so I'd give them privacy as they went through
3 documents and things. I can understand a little bit,
4 sometimes if it's a private corporation, and you're
5 going out and you're looking at something, you've got
6 a little bit of -- you may not want a plaintiff's
7 lawyer rummaging around your offices and talking to
8 employees and things like that, so you figure out
9 some way to sort of escort people out there. But I
10 think in the particular circumstance of this, where
11 we may have a large number of defense lawyers there,
12 they are going to probably be discussing this with
13 each other. They're going to be probably saying, Mr.
14 Villa, have you looked over here? And if the
15 Government lawyers are there, I think it's going to
16 inhibit their ability to do the things they need to
17 do at a site visit.

18 So I don't think any of you have found any
19 cases that fit this into a box. But I see that the
20 visit is going to be inhibited, and not what the
21 defendant's need and what they probably will do, if
22 they've got the Government's attorney standing there
23 watching them do the inspection. And so I think
24 there are work thoughts, their work product will be
25 disclosed, or that it will not take place. It will

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1 not be robust. I don't think the defense lawyers are
2 going to steal anything or take anything. And there
3 will be plenty of people there to make sure they
4 behave in a prison setting. So I'm inclined to grant
5 their motion. And the Government has access to the
6 facility all the time. And I just think for the
7 robustness of the defendants' site visit, it should
8 just be them that are present.

9 All right. Ms. Fox-Young, if you wish to
10 speak on behalf of your motion.

11 MS. FOX-YOUNG: Thanks, Your Honor.

12 Justine Fox-Young on behalf of Mr. Perez.
13 I won't go into great detail on the legal arguments
14 unless the Court has a particular question. And we
15 did file a reply late last night, and I apologize --

16 THE COURT: Yeah, I got started on it, but
17 I didn't get quite done with it. But I did start it
18 this morning.

19 MS. FOX-YOUNG: I know the Court is very
20 efficient, and it was only a few hours ago. If there
21 are any specific questions related to the reply, I'm
22 happy to go through those.

23 I do want to clarify for the Court that we
24 are scheduled, not only to visit Southern New Mexico
25 Correctional Facility, but also to view all the

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1 evidence in this case, all the tangible physical
2 evidence.

3 At the last hearing I think it was somewhat
4 unclear, first, as to where all that evidence is
5 located. And I would like to just put on the record
6 that we think -- and if there is an issue, we think
7 the Court should order it -- but we think we're
8 entitled to view all the evidence related to all the
9 counts, given it is a VICAR case, and given all the
10 allegations in this case, we've received all
11 discovery. Although, this viewing is only set up for
12 the defendants in Count 6 and 7, relating to the
13 Molina murder.

14 We also at Southern New Mexico Correctional
15 Facility think we ought to be entitled, and would
16 like to schedule visits of both pods, A pod and B
17 pod, upstairs and downstairs, the control room, the
18 wheelchair program, and the pod where defendants were
19 moved subsequent to the murder.

20 And so, if the Court has further questions,
21 given that we are going to be viewing evidence, in
22 addition to visiting the facility, I can go through
23 those. But, you know, as we say in the briefing, we
24 don't object to the presence of agents necessary to
25 maintain chain of custody, or to maintain security.

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1 But we feel strongly that those individuals should
2 not be members of the prosecution team.

3 And given the Government's response, which
4 was filed on Friday, we'd like the Court to order
5 that any information that is disclosed in the setting
6 at the facility or at the evidence viewing, any
7 information that is obtained by agents or COs, not be
8 forwarded to the prosecution team. And there are
9 easy measures that the Government takes. I note in
10 our reply that in recent weeks the Government has
11 served warrants using a filter agent or filter
12 agents. The Government knows how to employ taint
13 teams. The Government knows how to impose firewalls.
14 But we think that the Court ought to order that any
15 discussions, any work product -- and we think that
16 everything that we say, produce, develop, record, any
17 processes that we employ on Friday, are work product,
18 and we don't want that information disclosed to the
19 prosecution team.

20 THE COURT: All right. Anything else,
21 Ms. Fox-Young?

22 All right. Anyone else want to speak on
23 this motion? Mr. Davis?

24 MR. DAVIS: Judge, just briefly. One thing
25 that wasn't mentioned by Ms. Fox-Young was we

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1 anticipate videotaping certain areas of that facility
2 for use at trial. And so we ask the Court to give us
3 permission to do that as well.

4 THE COURT: All right. Anyone else?

5 All right. Mr. Castellano, are you going
6 to speak on this motion?

7 MR. CASTELLANO: Yes, Your Honor.

8 THE COURT: Mr. Castellano.

9 MR. CASTELLANO: Thank you, Your Honor.

10 May it please the Court.

11 THE COURT: Mr. Castellano.

12 MR. CASTELLANO: I guess, Your Honor, I
13 would start out with the question to the Court, in
14 terms of how many times has this -- a request like
15 this been made to the Court, and how many times has
16 the Court granted such a request? I've been doing
17 this for 19 years, Ms. Armijo for a little bit
18 longer. We have never run into the situation. She's
19 done this in capital cases, and it's just never been
20 a problem. So has the Court run into this before?
21 And has the Court granted this motion before?

22 THE COURT: I couldn't tell you. If you
23 don't see it in any of my opinions or anything -- it
24 could have come up like requests come up in a hearing
25 like this, and I might have done it. But probably a

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1 better request to ask Ms. Wild. Anything come up
2 like this? She's saying probably not in the criminal
3 context, but we've had some similar stuff like this
4 in civil cases. I do my own discovery in the civil
5 cases, so I may have had something like it more in
6 the civil context.

7 MR. CASTELLANO: And I ask that question
8 for a reason. Because -- it probably has not come up
9 because it is not an issue. And I understand the
10 defense not wanting us to look over their shoulder,
11 and we're not interested in looking over their
12 shoulder. But as a practical matter, each of these
13 teams represents one defendant. We're prosecuting
14 40-plus defendants, and have our own cases on the
15 side. So when an opportunity comes like this for us
16 to view the evidence -- it's true that at any given
17 time we can go and look at evidence, but it's just
18 not practical for us as well. So, if the evidence is
19 going to be at a certain place at a certain time,
20 it's a better time for us to be there, just as a
21 practical matter for us to look at it.

22 I've already looked at evidence with a
23 couple counsel in this case, Ms. Sirignano, and
24 Ms. Harbour-Valdez on a smaller scale. There was no
25 problem there. If counsel needs to step back for a

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1 few minutes to discuss the matters, that's fine. If
2 they need us to step back and discuss the matters,
3 that's fine. But like I said, it just doesn't come
4 up, because it's just never a problem. And I would
5 invite counsel to talk about times when that's been a
6 problem for them to view the Government's evidence in
7 a case like this.

8 The best quote in the abstract the defense
9 has is they want to see the evidence, free from the
10 roving eye of the prosecutor or the court. And
11 that's from the Reagan case. But in that case, it's
12 a completely different context, because in the Reagan
13 case, that quote is related to a shiv that was
14 provided to the defense team, so they had their own
15 secure facility to look at classified information.
16 And we would agree in those circumstances, defense
17 should have its own area to review its own discovery.
18 In this case, reviewing the Government's discovery,
19 not their own.

20 So, as the Court noted, there just aren't
21 any cases on point because this typically is not an
22 issue.

23 The other issue -- well, there are a couple
24 other additional issues. One is that, as the Court
25 knows, the presence of a third party vitiates any

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1 issues related to privilege. So the defense is
2 inviting third parties in who are law enforcement,
3 but at the same time still wanting the advantage of
4 the privilege. And it's just not practical.

5 And the reply indicates that we would be
6 actively seeking the information from the agents.
7 But what we said it would, nonetheless, increase the
8 likelihood that we would obtain the information.
9 Obviously, the defense in court has argued to this
10 Court that the Corrections Department and State
11 Police and other agencies are so tied into this case
12 with the Government that basically they are members
13 of the team.

14 So they can't get away from that at this
15 point by saying, Well, we're going to let members of
16 their team, if you buy the argument, sit in on our
17 evidence viewing, but at the same time, we don't want
18 them to talk about what we talked about. It's just
19 not practical.

20 The other issue is --

21 THE COURT: Don't we kind of do that all
22 the time? When I've got an attorney that's being
23 fired by a defendant, the U.S. Attorney's Office
24 steps out, but the marshals stay in here. I mean,
25 there is nothing that can be done about that. At the

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1 same time with the prison, it's not going to be an
2 empty prison. So people are going to have to be
3 there to -- when I've gone to prisons and things,
4 they -- there is people with me, and then there is,
5 obviously, the prison going about its business. But
6 we still sort of protect that sort of communication
7 between the defendant and the court and their
8 attorneys, even though there is third parties here.

9 MR. CASTELLANO: I agree. And if there are
10 issues, the additional personnel become witnesses.
11 And practically speaking, this happens every day
12 we're in court. When counsel are speaking to their
13 clients, the Government is in the room. We don't try
14 to eavesdrop on their conversations. But we are at
15 the same place at the same time conducting business.
16 They have their private conversations, and we don't
17 interrupt them.

18 The other issue is that we're going to have
19 multiple defense teams there discussing the case. So
20 there are two explanations: One, if you have teams
21 there doing their own thing, they're invading the
22 privacy of the other team when they discuss the case.
23 The other reality of the situation is that there is
24 probably a joint defense agreement, where they're
25 agreeing to do this. And that raises the issue of

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1 whether or not the Court is willing to look at the
2 joint defense agreement, to make sure there are no
3 issues when things like this come up. Otherwise, the
4 presence of each of these defense team interferes
5 with the confidentiality of any other team.

6 THE COURT: All right.

7 MR. CASTELLANO: That's it, Your Honor.
8 Otherwise, it's just not practical, because we need
9 to look at the evidence also, and we don't have that
10 many hours in the day either.

11 THE COURT: Let me ask -- before you go,
12 Mr. Castellano, let me ask Ms. Fox-Young, how long do
13 you think this tour is going to take?

14 MS. FOX-YOUNG: Your Honor, physically the
15 tour of Southern, the evidence viewing, or
16 everything?

17 THE COURT: Well, I guess I don't know what
18 "everything" is. I thought this was primarily
19 viewing of the prison. What else are you going to be
20 looking at while you're there?

21 MS. FOX-YOUNG: Your Honor, we'll be
22 viewing the physical evidence collected in the case.
23 I can't tell the Court how many pieces of evidence,
24 the volume that exists, because we have not --
25 although we've asked for some time for this

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1 opportunity, we have not physically viewed it. I
2 could speculate, but I think it's going to take the
3 better part of the day to do all this. I will note
4 that with respect to the last point, some defense
5 counsel --

6 THE COURT: Well, let me let Mr. Castellano
7 finish, then I'll let you.

8 Do you have anything? I guess what I was
9 thinking, Mr. Castellano is, if it's important to
10 view it at about the same time, it seems like, if
11 they're going to be there on the 2nd, or whatever day
12 it is, could you just arrange with the prison to be
13 there the next day?

14 MR. CASTELLANO: I think what we're having
15 is two things going on that day. One is an evidence
16 viewing in Las Cruces. The defense has also
17 requested the opportunity to see the facilities at
18 Southern. So there are actually two moving parts.

19 THE COURT: Where is the evidence viewing
20 taking place then? What are we talking about? The
21 shanks and that sort of stuff?

22 MR. CASTELLANO: Right, probably the State
23 Police Office. And then there is a visit to
24 Southern. Now, this is a request to view the
25 evidence from Counts 6 and 7. I heard additional

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1 requests this morning that weren't made before, so
2 we're going to have to sort through that probably on
3 another occasion.

4 The other issue is we will need to know
5 the -- have a request from defense counsel where they
6 want to visit at the Corrections Department. Now, my
7 understanding is the Corrections Department has
8 agreed to these things, but they just need to know
9 where people will be in the facility and when.

10 THE COURT: All right. Thank you, Mr.
11 Castellano.

12 MR. CASTELLANO: Thank you, Your Honor.

13 THE COURT: Ms. Fox-Young?

14 MS. FOX-YOUNG: Thank you, Your Honor.

15 I did list the areas of the facility that
16 defendants, defense counsel, and their teams would
17 like to visit. And I can go through that again, if
18 the Government needs. Those are both A pod and B
19 pod, both upstairs and downstairs, the control room,
20 the wheelchair program, and the pod or pods where
21 defendants were moved after Molina died.

22 And, Your Honor, I'll just go briefly
23 through the points that the Government raises. I
24 don't want to belabor this, and I know the Court has
25 other motions to address. We acknowledge that this

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1 is an unusual request, but this is also an unusual
2 case. The Government has charged in a particular
3 manner. We've gone over and over the complexity of
4 the case and the volume of the evidence. We do
5 request to see all of the physical evidence.
6 Although, we're charged in Counts 6 and 7, and at
7 least one of the defendants charged in Counts 6 and 7
8 also charged in other counts. We think we're
9 entitled to see all of the physical evidence, not
10 just what the Government thinks is related to Counts
11 6 and 7. And that is partly because there are ties
12 between CIs. There are ties all across the various
13 enumerated counts in this case.

14 Secondly, I think the Court has already
15 addressed the practicality of the defense conducting
16 any sort of reasonable and productive viewing in the
17 presence of the prosecution. And it simply is not
18 practical to do it with them there. In the reply, I
19 addressed the Government's argument that defendants
20 waive the work product privilege. I think it's very
21 clear -- and I cite this Court's ruling in EEOC
22 versus Roswell Radio, from 2007, in which the Court
23 notes that, without deciding the point, even
24 selective disclosure of work product wouldn't trigger
25 subject matter waiver. I don't think there is

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1 anything to the argument that we would be waiving,
2 particularly if the individuals present are not on
3 the prosecution team. The fact that they have some
4 sort of law enforcement credentials doesn't change
5 that.

6 Without providing the Court all the
7 citations, we don't only cite Reagan, we cite
8 Hickman, we cite the recent DOJ case that addresses
9 whether or not the Blue Book is subject to production
10 under FOIA. The D.C. Circuit found that it is not,
11 because it constitutes work product. The Government
12 also cites that case. I think it really favors the
13 defense in terms of the broadness of the doctrine.
14 This Court has considered this doctrine in numerous
15 civil cases and criminal cases, and we go through a
16 number of those.

17 And finally, I just reiterate our request
18 that because of the increased likelihood that the
19 prosecution team could gain access to defendants'
20 work product, just based upon the way the evidence is
21 held, the custody of the evidence, and the location
22 at Southern, we ask that the Court order that that
23 information not be disclosed. And as has already
24 been mentioned, that would include any video of
25 defense counsel and their teams, sign-in sheets, and

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1 other records of the visit.

2 And finally -- I think other counsel may
3 want to address this -- other counsel have requested
4 that defendants go one by one to view the evidence,
5 and the Government has declined. And so that is why
6 we are proceeding this way. We tried to work this
7 out without the Court's involvement. However, the
8 Government's arguments with respect to defense
9 privilege, potential joint defense arguments are, you
10 know, this is not the context in which the Government
11 simply has no standing to raise them, and we argue
12 there is no waiver.

13 Thank you, Your Honor.

14 THE COURT: All right. Thank you,
15 Ms. Fox-Young.

16 Any other defendants? Mr. Castle?

17 MR. CASTLE: Yes, Your Honor.

18 Although this motion only deals with Counts
19 7 and 8, it's our understanding that the Court's
20 order is probably going to be the order that will
21 relate to any other evidence viewings.

22 I could tell the Court that the attempts to
23 look at the physical evidence in this case has a
24 tortured history. On behalf of the Count 1 and 2
25 defendants, we began in April to try to obtain an

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1 opportunity to look at the physical evidence in this
2 case. We asked, on behalf of Mr. Garcia, for a
3 confidential viewing of the physical evidence, so
4 that we could do it on our own without the other
5 defendants. That was denied by Ms. Armijo on April
6 27. She indicated that she was requiring it to be a
7 joint viewing with all defense counsel for defendants
8 indicted in Counts 1 and 2, and that that was for the
9 convenience of the Government. We specifically
10 objected to that. But in an attempt to try to reach
11 agreement, rather than litigate this issue, we've
12 agreed to a joint viewing.

13 But if the Government's position is going
14 to be that, by doing so, we're waiving the work
15 product privilege, we're asking for an individual
16 viewing. They can't have it both ways. They can't
17 insist on a condition that then ends up resulting in
18 a waiver of work product privilege. And so they can
19 either try to work with us and agree to allow us a
20 confidential viewing where our work product
21 privileges are intact, or they can do individual
22 viewings.

23 In addition, the reason this has probably
24 not litigated before Your Honor is because of the
25 unusual request here is that the Government be

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1 watching what we're doing. That's the unusual part.
2 Normally, the way evidence viewing happens is defense
3 counsel is allowed to do confidential viewing. This
4 is the first time I've ever heard of this. And so --
5 and finally, the argument that because law
6 enforcement might be present, that's only a
7 requirement for security purposes. It's no different
8 than when we talk to our clients in a room where one
9 of the marshals is present, the attorney-client
10 privilege still extends. Just because there is a
11 marshal there for security purposes, does not mean
12 you're waiving your attorney client privilege.

13 THE COURT: All right. Thank you, Mr.
14 Castle.

15 Mr. Lowry?

16 MR. LOWRY: Your Honor, only briefly. I
17 wanted to backstop Ms. Fox-Young's fine work.

18 I did want to point out one thing, and a
19 follow-up on Mr. Castle's comments. If the
20 Government wants to argue that there is a waiver
21 because other law enforcement officials will be in
22 the pods that we'll visit, the alternative to that is
23 to have the Court order the whole pod vacated, and
24 you know, we can cover up the cameras and seal the
25 room. But that's frankly not practical, and that's

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1 why we're trying to make this accommodation. And I
2 think the Court has the authority, even if there is
3 an allegation that there would be waiver under
4 Federal Rule of Evidence 502(d), that the controlling
5 effective order of this Court that any, even alleged
6 waiver has taken place, that that isn't a waiver.

7 So in other words, what Ms. Fox-Young said,
8 I think, is actually well-founded; that this Court
9 should order that there is no waiver just because
10 other individuals or law enforcement officers may be
11 present; that that doesn't vitiate any work product
12 privilege or attorney-client privilege that would
13 exist. We're trying to make this a reasonable and
14 practical accommodation to everyone involved. And
15 it's, frankly, insensitive that that would be held
16 against us, Your Honor.

17 THE COURT: All right. Thank you, Mr.
18 Lowry.

19 Anyone else?

20 All right. I will grant the joint motion
21 to exclude the prosecution team from the December 2,
22 2016, evidence viewing. The prosecution team should
23 not go in the next day or any other time and try to
24 elicit information about what the defense lawyers did
25 while they were there. And if they are approached by

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1 anyone with the Corrections Department or the State
2 Police -- if that's where the viewing of the other
3 evidence takes place -- with information, they should
4 not take that information without, A, consulting with
5 coordinating counsel, and seeing if it can be worked
6 out. And if it's not in the nature of something that
7 can be worked out, then don't take it without
8 approaching the Court and trying to approach with as
9 much information for everyone to know about it as
10 possible. But those will be the contours of the
11 visit.

12 If the Government wishes to challenge, down
13 the road, the fact that there is not work product
14 here, they can raise that down the road in the
15 specific context of the information that they're
16 trying to get ahold of, or saying that's been waived,
17 rather than us trying to decide that today in a
18 vacuum, in a theoretical sense, I think I am trying
19 to preserve the defendants' ability to talk while
20 they're there, and do what they need and can do
21 there. So I'd be inclined to continue to protect it
22 down the road, whether it fits neatly into some
23 recognized privilege or protection, or just my
24 ability to control the discovery in this case.

25 As far as all the other requests that are

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1 being made, until there is a problem, I'm not going
2 to start ordering people to do things, particularly
3 people that aren't here. So it seems like y'all have
4 been able to work out a lot of issues with this
5 visit. And so if there is problems, y'all can
6 re-approach.

7 But at the present time, I'm a little
8 reluctant to start ordering Corrections to do things,
9 and I not know what I'm ordering, and the impact it
10 might have in the prison facility. So I'm not
11 inclined to start doing that off the cuff today.

12 Let's take a break. If you have something
13 else you want to say on this -- this was the easy
14 issue, so if you have more things to say on the easy
15 issue, but I've got to give Ms. Bean a break. So
16 we'll take it up afterwards. All right. We'll be in
17 recess for about 15 minutes.

18 (The Court stood in recess.)

19 THE COURT: All right. Ms. Fox-Young, do
20 you have something further you wanted to say?

21 MS. FOX-YOUNG: No. Thank you, Your Honor.

22 THE COURT: All right. I wasn't trying to
23 scare you off.

24 MS. FOX-YOUNG: Thank you, Judge. We
25 resolved our outstanding issues. I think we're all

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1 set for Friday. Thank you.

2 THE COURT: All right. Ms. Armijo?

3 MS. ARMIJO: Your Honor, one thing that we
4 did talk about, right now we have two sets of
5 viewings set for Counts 1 and 2, and then the Molina
6 murders. And just so that we're clear, then we have
7 point persons assigned to each of those that will be
8 reaching out to anybody. And if anybody from the
9 other counts wants to attend those, then they're
10 welcome to. We're not going to restrict it to, you
11 know, the defense teams in those counts, but -- and
12 so, as we go through the different murder teams, so
13 to speak, we will open it up to everybody, and have
14 one point person. I think that's what we decided
15 over the break. And I know Ms. Strickland is going
16 to be the one for the one that's coming up.

17 THE COURT: Okay. All right. Mr. Cooper?

18 MR. COOPER: Thank you, Judge. I'm the
19 point person for the December of 15 viewing of the
20 evidence and the site at SNM, Counts 1 and 2. If
21 anybody wants to come to the SNM site viewing, they
22 need to send me their name and date of birth, so I
23 can forward it on to Ms. Armijo. And we're going to
24 do the December 15 under the same terms and the
25 conditions you set for Mr. Villa's tour.

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1 THE COURT: Thank you, Mr. Cooper.

2 MR. COOPER: Thank you, Judge.

3 THE COURT: Anything else on that?

4 All right. Well, let's turn to CIs. Let
5 me make a few comments. As we know from the hearings
6 we've been together in, a lot of these have dealt
7 with procedural issues, scheduling, discovery, and
8 things like that. But now we're moving into a new
9 phase that requires me to make very fact-intensive
10 determinations as to who gets this information, if
11 anybody.

12 You guys know a lot more about this case
13 than I do, and particularly the facts of your counts
14 and the alleged murders, and who was involved. I
15 work hard, I try to read everything, so I try to be
16 as prepared as I can. But I'm just not as familiar
17 with these names, events, and things like that as you
18 are. So, as we move into this phase, don't feel like
19 you're going to insult me if you repeat names and
20 repeat incidents and stories. You need to educate
21 me. That's the only way I can make an informed
22 decision on this. So I encourage you to educate me
23 about the facts, because that's what I'm going to
24 need to make these determinations.

25 All right. Mr. Villa, I know you filed the

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1 motion. It looks like maybe you got your issue
2 resolved, or you're a long way down the pike. Why
3 don't you tell me exactly where you are, or what you
4 want to tell me, and if you have any remaining
5 issues, what they are.

6 MR. VILLA: Thank you, Your Honor.

7 THE COURT: Mr. Villa?

8 MR. VILLA: Today we don't have any
9 remaining issues that we're going to ask of the
10 Court. So we filed our motion; the Government agreed
11 to disclose to us, and us alone, under the conditions
12 of the protective order that you signed, the name of
13 the informant and the informant's attorney. They
14 have done that.

15 Should the Court grant any of the other
16 requests today, we may come back to you to modify the
17 protective order; for instance, to allow us to
18 communicate with our co-counsel about those things,
19 share information.

20 THE COURT: Let me just ask: That
21 protective order is public?

22 MR. VILLA: Your Honor, I believe it was
23 filed publicly --

24 THE COURT: Can you remind me, then, the
25 terms of the protective order?

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1 MR. VILLA: Sure, Your Honor. The
2 protective order --

3 THE COURT: It's attorneys' eyes only?

4 MR. VILLA: As attorneys, we were allowed
5 to tell Mr. Perez who it is. He's not to disclose it
6 to anyone. And we can disclose it to our
7 investigator, defense team, and that sort of thing,
8 but we cannot disclose it to anybody else. So we
9 have not done that.

10 But I do think, if the Court were to grant
11 it as to some of the other co-defendants, if the
12 Government was not agreeable, we may come back and
13 ask for permission to modify that protective order,
14 or -- we certainly reserve our right to seek other
15 information about the informant as we conduct our
16 investigation.

17 One of the things that we agreed with the
18 Government -- so I'm not asking for any of that
19 today -- we had asked for a number of things about
20 this informant. And we agreed to, essentially,
21 withdraw those requests in exchange for the
22 information. But we may come back to the Court at a
23 later date, depending on what our investigation
24 uncovers. But for today's purposes, for Mr. Perez,
25 we are satisfied.

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1 THE COURT: Okay. Thank you, Mr. Villa.

2 All right. Who, then, do we want to take
3 up first? Who is the person, then, that we need to
4 take up first? Is it Mr. Troup that's going to
5 have -- be the first person?

6 MS. HARBOUR-VALDEZ: Your Honor, I'm happy
7 to go first.

8 THE COURT: All right.

9 MS. HARBOUR-VALDEZ: Your Honor, as I
10 stated in the reply, the source at issue here makes
11 just a couple of statements that relate to Mr. Troup.
12 I think --

13 THE COURT: What would be best for me to
14 have -- would it be to have Mr. Villa's redacted
15 material in front of me, so I can see the statements
16 that you're going to be referencing?

17 MS. HARBOUR-VALDEZ: That might be helpful,
18 Your Honor.

19 THE COURT: All right. So I have it in
20 front of me. And do you have it in front of you?

21 MS. HARBOUR-VALDEZ: I can shortly, yes.

22 THE COURT: All right. So then there is
23 CM/ECF numbers at the top. If you want to take me to
24 those; give me the docket number and then the CM/ECF.

25 MS. HARBOUR-VALDEZ: Sure. It's Docket No.

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1 698-1, and it would be page 2 of 2, to which I'm
2 referring.

3 THE COURT: Okay. Hold on just a second.

4 Let me do some thinking here, to get myself -- all
5 right. So I have that in front of me. And you were
6 about to tell me there are two statements in here
7 that reference Mr. Troup?

8 MS. HARBOUR-VALDEZ: Yes, that would be in
9 paragraph 6, Your Honor.

10 THE COURT: I'm going to see if I can find
11 a highlighter here. All right. It's --

12 MS. HARBOUR-VALDEZ: Paragraph 6. It
13 starts with, "The Rascon brothers."

14 THE COURT: All right. I got it.

15 MS. HARBOUR-VALDEZ: So this CI -- first of
16 all, I'm going to go with the second sentence that
17 talks about the paperwork that was delivered.

18 THE COURT: And can you -- if you know, can
19 you educate me about what that term means?

20 MS. HARBOUR-VALDEZ: Yes, Your Honor. It's
21 been known throughout the discovery that there were
22 documents confirming that the victim, FS, was a known
23 informant. The discovery produced thus far
24 indicates --

25 THE COURT: Is it known to everybody who FS

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1 is?

2 MS. HARBOUR-VALDEZ: Yes. I just didn't
3 know if the Court wanted me to use the names.

4 THE COURT: I would appreciate it. I'm
5 going to have to get into this.

6 MS. HARBOUR-VALDEZ: It's Freddie Sanchez.

7 So the discovery that's been disclosed thus
8 far indicates that it was known among everyone that
9 he was an informant, and that these documents, this
10 paperwork, had been circulated among the inmates at
11 Southern New Mexico Correctional Facility.

12 THE COURT: And this paperwork like a plea
13 agreement, or what are we talking about?

14 MS. HARBOUR-VALDEZ: We don't know --

15 THE COURT: You don't know what paperwork
16 is --

17 MS. HARBOUR-VALDEZ: The discovery
18 indicates that that paperwork was somehow destroyed.

19 THE COURT: Okay, but it was something that
20 indicated that --

21 MS. HARBOUR-VALDEZ: That he had cooperated
22 in some previous matter.

23 THE COURT: Mr. Sanchez was a cooperator?

24 MS. HARBOUR-VALDEZ: Correct.

25 So this CI is the first one who indicates

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1 that someone by the name of "Cheech" delivered that
2 paperwork to Southern New Mexico.

3 The discovery that's been produced to date
4 indicates that there was a gentleman named Kyle
5 Dwyer, who was housed there at Southern with everyone
6 else -- did not use the name or the alias "Cheech" --
7 actually admitted to being the individual who
8 delivered the paperwork from PNM in Santa Fe down to
9 Southern New Mexico. And in fact, Mr. Dwyer received
10 a misconduct report for his activities related to
11 that.

12 Unfortunately, Mr. Dwyer is deceased. So
13 we obviously cannot interview him. We cannot find
14 out if that is, in fact, true. We've done some
15 additional investigation on that. It appears that
16 Mr. Dwyer -- and this is not in my reply -- but Mr.
17 Dwyer may have, in fact, won a disciplinary appeal on
18 that very issue. We are looking for that information
19 now.

20 THE COURT: So the disciplinary issue of
21 having circulated this paperwork?

22 MS. HARBOUR-VALDEZ: Correct.

23 THE COURT: That was a violation of prison
24 regulations?

25 MS. HARBOUR-VALDEZ: Correct. But it

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1 appears that he may have appealed that, and won,
2 based on insufficient evidence. We are investigating
3 that now. It's not something that's been produced in
4 the discovery to date.

5 THE COURT: So he admitted to it, and then
6 he was also, then, sort of prosecuted by the prison
7 and -- but then they -- you think that they lost?

8 MS. HARBOUR-VALDEZ: Correct. I don't have
9 anything to provide to the Court yet, because we are
10 still investigating that. That is just on
11 information and belief at this point.

12 So, if in fact, Mr. Dwyer was exonerated,
13 perhaps someone named Cheech is responsible. We
14 would very much like to know who Cheech is. And I
15 haven't found that moniker elsewhere in the
16 discovery. If this individual was either in one of
17 the units, or knows who Cheech is, or was at PNM at
18 the time and knows about the paperwork, we would love
19 to know. I mean, that's one of the reasons we need
20 to know who this person is. He's provided an
21 alternate suspect, who perhaps had a hand in this
22 incident. So we certainly feel like --

23 THE COURT: When you say "alternate
24 suspect," what are you referring to?

25 MS. HARBOUR-VALDEZ: Well, in a conspiracy,

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1 Your Honor, assuming that Mr. Dwyer was still alive,
2 and lost his administrative appeal, I assume that he
3 would have been indicted in this case as a
4 co-conspirator for providing paperwork that then led
5 to the homicide in this case.

6 THE COURT: When I read "Huero" Troup,
7 that's your client?

8 MS. HARBOUR-VALDEZ: That's my client,
9 correct.

10 THE COURT: And what is the Government
11 accusing your client of doing?

12 MS. HARBOUR-VALDEZ: Of participating in
13 the homicide.

14 THE COURT: All right. Tell me about the
15 homicide.

16 MS. HARBOUR-VALDEZ: My version, or what --

17 THE COURT: I'll take either one, or both
18 of them. Let me have both of them. Give me the
19 Government's and then give me --

20 MS. HARBOUR-VALDEZ: The Government alleges
21 that a number of individuals, including Mr. Troup,
22 murdered Mr. Sanchez, after this paperwork was
23 circulated in the pod.

24 THE COURT: Is there any more details to
25 it?

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1 MS. HARBOUR-VALDEZ: There was DNA
2 evidence; my client was exonerated by that DNA
3 evidence.

4 There are a number of cooperating
5 defendants, we believe, who have given varying
6 statements.

7 But, again, this source is the only one who
8 has mentioned this person, Cheech, as being a
9 participant somehow in this conspiracy. That's why
10 we're interested in finding out who he is, what he
11 knows, how he knew Cheech had paperwork. Because, I
12 mean, he's a player in the conspiracy, clearly, if he
13 brought paperwork down.

14 THE COURT: Tell me what you do with that?
15 I mean, I guess --

16 MS. HARBOUR-VALDEZ: We're going to
17 interview Cheech.

18 THE COURT: -- you're going to have to
19 connect the dots for me here.

20 MS. HARBOUR-VALDEZ: We're going to
21 interview Cheech, once we know who he is. But more
22 importantly, we're going to interview this source,
23 and find out how did he know who Cheech was? How did
24 he know Cheech had paperwork? And more importantly,
25 getting to the other sentence that talks about the

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1 Rascon brothers, these are two unindicted -- perhaps
2 they're co-conspirators. How did he know that the
3 Rascon brothers were in bad standing? How did he
4 know the Rascon brothers were taking too long to
5 carry out the hit? Why are the Rascon brothers not
6 indicted? Was this person in the cell? Was he in
7 one of the pods? Was he at PNM? I mean, there are a
8 lot of questions we have. But without knowing who he
9 is, we can't investigate what his role was, and
10 whether he was a witness, whether he learned this
11 secondhand. It puts us at a huge disadvantage.

12 And this is just one CI, Your Honor. As
13 Mr. Castle mentioned earlier, we're talking about
14 370-something sources in this case. And it really
15 makes our job very difficult to investigate, when
16 we're chasing rabbit trails, trying to figure out who
17 these people are, and whether we can go and interview
18 them.

19 THE COURT: Well, I just ask for sufficient
20 bread for today. So let's just take this one here.

21 MS. HARBOUR-VALDEZ: Okay. Exactly. We're
22 starting small.

23 THE COURT: If you knew who Cheech was, and
24 if you knew who this confidential human source was,
25 and you hit the jackpot of getting information from

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1 him, what would that be?

2 MS. HARBOUR-VALDEZ: It could be
3 exculpatory.

4 THE COURT: Tell me how. Tell me, in your
5 wildest dreams, what it would be?

6 MS. HARBOUR-VALDEZ: Perhaps the Rascon
7 brothers are more responsible than what we have been
8 led to believe. Perhaps they are cooperating with
9 the Government. That would be nice to know, if they
10 were -- we know they were there, we know they were on
11 the bottom tier, with a number of other individuals,
12 who were indicted. I think it leads to some
13 alternate suspects that could provide exculpatory
14 evidence for Mr. Troup.

15 We'd also like to explore, if in fact they
16 are cooperating, what kind of deals did they get?
17 How could we impeach them if they were called to
18 testify? I know some of that is going to come later,
19 closer to trial. But I think now we've got at least
20 one person that's not been previously mentioned in
21 discovery, this Cheech individual. It's someone
22 completely different than what we have learned,
23 through the discovery produced was actually -- who
24 was actually punished for bringing paperwork. It
25 also could lead to who, in fact, provided the

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1 paperwork from PNM. Is there another person who was
2 the shot-caller that we're unaware of?

3 You're asking me to speculate. I mean,
4 that's really all we can do at this point.

5 THE COURT: If you were told who Cheech
6 was, tell me then why you would need the CHS?

7 MS. HARBOUR-VALDEZ: Well, I'd like to know
8 how he knows that Cheech was the one that had the
9 paperwork. Who gave to it Cheech? Was he at PNM?
10 Did he witness this? Did he see the paperwork?
11 Because, like I said, we haven't seen the paperwork.
12 We just have read through the discovery that
13 paperwork was circulated, but apparently, it was
14 destroyed. Was this CHS at Southern? Was this CHS
15 at PNM? Is he someone that was --

16 THE COURT: And this murder of Sanchez took
17 place where?

18 MS. HARBOUR-VALDEZ: 2007, at Southern New
19 Mexico.

20 THE COURT: All right. Anything else you
21 want to tell me in support of your motion?

22 MS. HARBOUR-VALDEZ: Well, I think it's
23 relevant and helpful to the defense. I've tried to
24 articulate that this morning with as much speculation
25 as I can.

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1 I think that the CI may have played a
2 crucial role, if in fact he was at one of the two
3 facilities when either the hit was ordered or the hit
4 was carried out. He could have been an eyewitness.
5 We don't know. And he's clearly assisting the
6 Government in obtaining the evidence. If they intend
7 to call him, I know, at some point we need to learn
8 his identity, but we'd like to learn it ahead of time
9 to start doing a little bit of investigation.

10 Like I said, it's just one of a number of
11 CIs that we're trying to identify, to start doing a
12 thorough defense investigation. And the longer we
13 delay this, Your Honor, the more our jobs are being
14 hampered. And I don't want to be in front of you in
15 March, April, May of next year arguing these same
16 things because we're trying to get ready for a July
17 trial date.

18 THE COURT: All right. Thank you,
19 Ms. Harbour-Valdez.

20 MS. HARBOUR-VALDEZ: Thank you.

21 THE COURT: Now, I don't want to jump into
22 all the other defendants telling me why they need
23 this information. That's not the question I'm
24 asking.

25 Does anybody else want to help

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1 Ms. Harbour-Valdez? Anybody had a thought there,
2 they want to say this is the reason I want to give
3 this information to Ms. Harbour-Valdez and Mr. Troup?

4 All right. Mr. Beck?

5 Basic question: I assume you know who the
6 CHS is; right?

7 MR. BECK: We do, Your Honor.

8 THE COURT: Because you've given it to Mr.
9 Villa.

10 MR. BECK: That's right.

11 THE COURT: Are you going to call the CHS
12 as a witness in your trial?

13 MR. BECK: At this time, we intend to, Your
14 Honor.

15 THE COURT: So this is a Jencks person?

16 MR. BECK: That's right.

17 THE COURT: Do you know who Cheech is?

18 MR. BECK: I do not.

19 THE COURT: Have you ever asked the CHS who
20 Cheech is?

21 MR. BECK: We've not.

22 And so, Your Honor, I think you're getting
23 to one part of the analysis we have to look at with
24 CIs, is whether it's a testifying witness, or whether
25 it's a CHS. And if it's a CHS, a nontestifying

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1 witness, then we go through the Roviaro calculus.

2 If it's a testifying witness, that puts it
3 under Jencks, and we're talking about -- as
4 Ms. Valdez -- excuse me --

5 THE COURT: Is there a case that says that?

6 MR. BECK: Yes.

7 THE COURT: Is there a case that says I
8 don't do the CI analysis if you're telling me that
9 he's going to be -- he or she is going to be a
10 testifying witness -- that I have to defer on the
11 Jencks side; I can't do the CI analysis?

12 MR. BECK: So, Your Honor, I will refer the
13 Court to -- and again, this kind of came up
14 happenstance, because the reply was really what led
15 to there being actual evidence that we should
16 disclose the CHS. So since there is no surreply,
17 much of this information, in terms of distinguishing
18 these, is found in our response to the Gallegos
19 motion in the Baca matter. So that is Document No.
20 255 in Case No. Criminal 16-1613 JB. And so, in that
21 case --

22 THE COURT: Not the factual material, but
23 just the law?

24 MR. BECK: Just the law in that case.

25 THE COURT: Okay. Remind me -- I read it,

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1 of course, but remind me of what the law is.

2 MR. BECK: So there is --

3 THE COURT: Let me see if I can pull that
4 up. Let's see, it's Document 255. Okay.

5 MR. BECK: So at page 5 of that, we quote
6 from United States against Glover, which is found at
7 583 F.Supp. Reporter 2d -- starts at page 5; and the
8 cite is to page 12. And this is from the District of
9 Columbia District Court in 2008. And it says,
10 Roviaro and its progeny regarding the disclosure of
11 confidential informants -- the quotation starts here:
12 "apply only when the informant does not testify at
13 trial." That's the end of that quote. It's quoting
14 a Third Circuit decision from 2002.

15 Also, this District, Judge Brack has
16 addressed this issue, in United States against Lujan.
17 It starts at 530 F.Supp. 2d, page 1224. And Judge
18 Brack also agreed that there is differentiation
19 between testifying witnesses and confidential
20 informants who will not testify. And that Roviaro
21 and that calculus applies only when it's a CHS that
22 will not testify at trial.

23 THE COURT: Did the defendants, either in
24 Baca or this case, have they discussed this legal
25 point?

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1 MR. BECK: Not in the briefing, as far as
2 I've seen, no. So what happened was the briefing --
3 the brief in chief by Mr. Villa provided the law.
4 And then the reply provided additional facts why this
5 particular CHS may have information that would
6 require disclosure under Roviaro.

7 THE COURT: They just did a CI analysis?

8 MR. BECK: That's right, Your Honor.

9 THE COURT: Well, stand right there. But,
10 Ms. Harbour-Valdez, do you, from a legal standpoint,
11 have something that is different than what Mr. Beck
12 is presenting?

13 MS. HARBOUR-VALDEZ: Your Honor, I don't
14 disagree with his analysis, and that's what we
15 adopted from Mr. Villa's motion. So we adopt --

16 THE COURT: Well, but what I remember, from
17 reading everything in Baca, and then reading Mr.
18 Villa's briefing is this point of what is -- what
19 goes first, whether you do the CI analysis, or you do
20 a Jencks, is the defendants haven't spoken on that
21 point. So do you agree with Mr. Beck, the
22 Government's analysis of that, which is Brack's
23 position?

24 MS. HARBOUR-VALDEZ: Not necessarily.

25 Because if he was -- and we don't know this -- if

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1 this informant was a participant and a material
2 witness, we think that we've met the burden to have
3 his identity released.

4 THE COURT: But do you have any law that
5 says, no, if it's a testifying witness, then you've
6 got to run it through the Jencks hurdles?

7 MS. HARBOUR-VALDEZ: I don't have any
8 evidence.

9 THE COURT: All right. Anybody on the
10 defense side? Mr. Hammond? Do you have anything? I
11 mean, is that the way -- do you disagree with the
12 Government? Have anything --

13 MR. HAMMOND: Your Honor, I do. And can
14 the court reporter hear me?

15 THE COURT: I think she can. Can you hear,
16 Ms. Bean? Go ahead.

17 MR. HAMMOND: We have not briefed in our
18 separate response, on behalf of Mr. Montoya, this
19 particular point. It wasn't raised in the briefing
20 in this cycle. And frankly, I wasn't aware of what
21 had been filed in the Baca case. But I believe that
22 the law is not black and white on this. I believe
23 that the law is that, even with a testifying CI, if
24 there are reasons presented why the identity of the
25 CI needs to be known now for investigative purposes,

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1 and preparation purposes of -- particularly, if the
2 CI may himself have been a participant in the crime,
3 I believe that courts have ordered that CI
4 information be produced well in advance of the Jencks
5 deadlines.

6 THE COURT: Okay. All right. I'll let the
7 defendants rebut Mr. Beck here. And I'll give you a
8 chance to rebut him, Ms. Harbour-Valdez. But let me
9 not chop up Mr. Beck's arguments too much.

10 Mr. Beck?

11 MR. BECK: And, Your Honor, as I pointed
12 out here, these are district court decisions. There
13 is a First Circuit decision -- again, this is in our
14 brief -- there is a First Circuit decision from 1992
15 that suggests the same thing. So --

16 THE COURT: You said the D.C. Circuit
17 relied upon a Third Circuit?

18 MR. BECK: The District Court from D.C.,
19 right, relied upon a Third Circuit. And then there
20 is a First Circuit decision from 1992, United States
21 v. Tejeda, 974 F.2d 210. The quote is from 217. And
22 it says, "The disclosure requirement in Roviaro was
23 predicated on the failure of the prosecution to make
24 either the informant or the informant's identity
25 available to the defense in a case where the

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1 informant was never called as a witness." And so,
2 again, I'm not saying that -- I mean, I'm not going
3 to stand here and tell you that the Tenth Circuit
4 spoke on this; that the Supreme Court has spoken on
5 this. I'm not going to --

6 THE COURT: Tell me, though -- I think this
7 is what Mr. Hammond was getting at -- say that's the
8 law; say there is a bunch of district courts that
9 have done that. What is the rationale for that?
10 What would be the rationale for saying that if this
11 is going to be a testifying witness, we're going to
12 run them through Jencks and never do the CI analysis?

13 MR. BECK: I think the analysis is the same
14 as with all the Government's witnesses, is that with
15 this confidential human source, CI --

16 THE COURT: You're going to know it at some
17 point.

18 MR. BECK: You're going to know it at some
19 point.

20 THE COURT: You've got to wait your time.

21 MR. BECK: And you're going to know more
22 than you might otherwise, just having the CI's
23 identity. You're going to get all the Jencks
24 materials, as opposed to just the CI's identity. I
25 mean, again, in that brief we talked about the timing

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1 of when you would disclose the CHS. And it seems as
2 if -- again there is no set in stone; the Court's
3 going --

4 THE COURT: I mean, that's what we're
5 battling over, maybe to some degree, is when are you
6 going to disclose these CIs? They're going to say
7 that there is 360 of them. You dump them two weeks
8 before trial, it's just going to send everything into
9 turmoil as far as them getting ready for trial.

10 MR. BECK: Right. Yeah, I understand.

11 THE COURT: Do you have a response to that?

12 MR. BECK: I do. I don't anticipate that
13 the United States will call 360 CIs. I don't. I can
14 say that there are not 360 CIs. I will say that this
15 CI, as I said, will be testifying at trial.

16 THE COURT: Let's say you have a CI right
17 now that you think will be testifying at trial.
18 Something happens, and you decide not to call that
19 person. Then my ability to do sort of a Rule 16 CI
20 analysis earlier in the case to help them prepare for
21 trial, the defendants prepare for trial, is gone.

22 MR. BECK: Right.

23 THE COURT: What do you do with that?

24 MR. BECK: I thought about that. I
25 appreciate that it puts the Court and the defendants

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1 in an awkward position when we're saying this. And I
2 think --

3 THE COURT: Is there anything -- I'm sorry.
4 I should get your answer before I ask another
5 question.

6 MR. BECK: I think it's fair, and it's
7 reasonable that when the Court sees these motions to
8 disclose CI, that we go through, at one point, the
9 analysis, and the Court makes a call, both on this
10 decision -- because as far as I can find in the
11 Court's decisions -- and I've looked, you haven't
12 addressed this issue, as I said Judge Brack did -- we
13 make a call on that point of law. We make a call on
14 the timing. And then I think it may be still
15 appropriate to go through also the other side of the
16 equation, which is whether disclosure would be
17 required, that is a CHS. And then that puts the
18 Court in a position to rule, saying this is a
19 testifying witness. What if the Government decides
20 it's not going to call it, it's going to have to
21 disclose this CHS at the time that the Court is
22 required in other motions? And I know that that
23 creates extra work for the Court, perhaps. Although,
24 if the Court's going to do that work anyway, it means
25 that these hearings won't be short-circuited because

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1 I say this person is going to testify.

2 THE COURT: So you would say that I go
3 ahead and make the determination as to whether the CI
4 should be disclosed, and then -- but they wouldn't be
5 disclosed immediately, because you're planning to
6 call them at trial -- but if it's -- for some reason
7 you're going to not call that witness, something
8 happens in the case, then you would immediately
9 disclose that, if I had ordered it? Is that what
10 you're thinking or saying?

11 MR. BECK: I'm saying I think that would be
12 the most fair to the defendants. If I'm sitting
13 here, as the Government, obviously I don't -- I
14 mean -- but I'm saying I think that would be the best
15 course for the Court to take. And I wish I could say
16 that we have our -- you know, but the Court has much
17 more experience with trials than I do, and we know
18 that sometimes witnesses, when it's on the eve of
19 trial, decide not to testify, and sometimes
20 additional ones that haven't, agree to testify.

21 So I'm saying that, when I gave this some
22 thought, because I anticipated this would be a
23 problem for the Court and the defense, that I think
24 the best course is to make that finding, and order
25 that decision that this person is going to be a

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1 testifying witness, so this person will be disclosed
2 with Jencks. But if it comes to the point that this
3 person is not a witness, or the Government -- you
4 know, I mean, it comes to the point where this person
5 is not a witness, I find that this person is a CHS
6 who participated, who should be disclosed under
7 Roviaro, and I'm ordering that, if the Government
8 does not call this person, they must be disclosed as
9 a CHS, I think that's probably -- and I think that's
10 the most reasonable and the most fair analysis for
11 the Court to take.

12 THE COURT: Okay. Well, talk to me, then,
13 about this CHS, and why you shouldn't disclose it to
14 Mr. Troup?

15 MR. BECK: I think, if the Court looks at
16 the paragraph that we focused in on, paragraph 6,
17 that -- the second sentence, that "Weno and Huero
18 Troup saw the Rascon brothers were taking too
19 long" -- I guess it was, sorry, before that. The
20 Rascon brothers were in bad standing with the SNM,
21 were ordered to kill Freddie Sanchez; the paperwork
22 on Sanchez was delivered by Cheech. So Troup's
23 position is that Cheech has not been mentioned
24 before, is delivering paperwork, and that this would
25 help identify Cheech, if they could interview this

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1 person.

2 But the test, under Roviaro, is whether the
3 information would be helpful to the -- or, excuse
4 me -- so the test under Roviaro, as this Court
5 articulated in United States against Rivas and in
6 Aguilar, quoting United States v. Sinclair is, "The
7 Court must consider the particular circumstances of
8 the case, including the crime charged, the possible
9 defenses, and the significance of the informer's
10 testimony."

11 And here, when we look at that in Troup's
12 position, if we find out that Cheech was the person
13 who delivered this, and not Mr. Dwyer, then certainly
14 that's helpful and exculpatory to Mr. Dwyer. But not
15 towards Troup. Because the information, as it
16 relates to Troup, is the same; that Troup killed
17 Freddie Sanchez.

18 And so while it may be -- while the CHS may
19 be required to be disclosed under Roviaro for Mr.
20 Dwyer, if he were here, it is not significant
21 testimony as it relates to Mr. Troup. Certainly, I'm
22 not going to say that finding out who Cheech is would
23 not be helpful to her client, would not be helpful to
24 Mr. Troup. But that's not the analysis. That has no
25 salience in the Court's analysis.

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1 THE COURT: Why don't you achieve the
2 purposes of protecting the CHS by going a long ways
3 of just asking the CHS who Cheech is, and providing
4 that information?

5 MR. BECK: I think that we can provide that
6 information, I think --

7 THE COURT: Would you be willing to?

8 MR. BECK: Yeah. Yeah, I don't see why
9 not.

10 THE COURT: I guess it seems to me that
11 that would be the first step to sort of doing
12 discovery here, because Cheech seems to be the person
13 that may be more helpful than the CHS.

14 MR. BECK: Right. I agree. And we're
15 willing to do that, as we've done with Mr. Perez.
16 We're willing to work through some of these issues.

17 So I will represent to the Court that we
18 can tell Ms. Harbour-Valdez who Cheech is.

19 THE COURT: All right. Mr. Beck, anything
20 further on the Troup request for this CH?

21 MR. BECK: I mean, if the Court has any
22 specific questions --

23 THE COURT: Well, do you want to tell me
24 your version of what occurred here?

25 MR. BECK: Our --

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1 THE COURT: The murder.

2 MR. BECK: Our version is that paperwork
3 was passed that indicated that Freddie Sanchez had
4 given information to law enforcement. And again, I
5 think sometimes we get misled with the term of
6 "informant," versus "cooperator," versus "CHS,"
7 versus "cooperating witness." And I think we should
8 be careful in distinguishing those terms.

9 THE COURT: And I'm trying.

10 MR. BECK: And I appreciate that.

11 So, at some point, there was paperwork --
12 which can be a range of things; it can be J and S
13 paperwork, or whatever it may be -- but it was passed
14 to two people. And then, we believe that, as I've
15 said, the Rascon brothers were ordered to hit Freddie
16 Sanchez, and that Troup was one of the people who did
17 it at Southern New Mexico Corrections Facility.

18 THE COURT: And you think he was actually
19 one of the people that killed Mr. Sanchez?

20 MR. BECK: Yes.

21 THE COURT: Physically?

22 MR. BECK: Right.

23 THE COURT: All right. What else, Mr.
24 Beck?

25 MR. BECK: I guess, as I said, that's

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1 probably the strongest argument as it relates to Mr.
2 Troup. And I guess we'll keep going.

3 THE COURT: All right. Is that
4 Mr. Chambers coming on the line?

5 MR. CHAMBERS: It is, thank you.

6 THE COURT: All right. Welcome,
7 Mr. Chambers.

8 All right. Anything else, Mr. Beck?

9 MR. BECK: Not at this time, Your Honor.

10 THE COURT: All right. Thank you, Mr.
11 Beck.

12 Let's see, Ms. Harbour-Valdez, let me ask
13 your co-defendants here, anybody want to say anything
14 on this request of Mr. Troup for the identity of this
15 CHS? Did you have your hand up, your good hand,
16 Mr. Hammond?

17 MR. HAMMOND: Yes, Your Honor. We aren't
18 involved in the counts that he was just talking
19 about.

20 THE COURT: Right.

21 MR. HAMMOND: We are involved in Mr.
22 Villa's count, and at some point we'd like to be
23 heard.

24 THE COURT: Oh, yeah, I'm going to give it.
25 I'm just trying to focus on Troup's request here.

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1 Anybody else?

2 All right. Ms. Harbour-Valdez?

3 MS. HARBOUR-VALDEZ: Your Honor, first, I
4 would ask why it was given to Mr. Villa, via
5 protective order, if Jencks governs? I think there
6 was a different analysis applied there.

7 THE COURT: Well, I mean, I know the
8 defendants are concerned about consistency and
9 inconsistency in what they're doing over here. They
10 are the Government. They can disclose everything.
11 And if we think about it, I mean, it could be
12 nefarious; it could be just strategy -- it could
13 be -- we all waive -- as we go through litigation, we
14 waive work product, otherwise we couldn't have a
15 trial; right?

16 So eventually we waive work product.
17 They're waiving it at different times. And we all do
18 that, so --

19 MS. HARBOUR-VALDEZ: All right. Well, in
20 reading --

21 THE COURT: -- we'll have to live with that
22 inconsistency, if there is one.

23 MS. HARBOUR-VALDEZ: Okay. In reading this
24 Court's Aguilar opinion, I think what we still need
25 to focus on here is that, obviously, the CHS is going

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1 to testify. What we're trying to determine is
2 whether he was, in fact, a witness or a participant;
3 whether he was one of the people in this pod at
4 Southern, or was in the pod at PNM, from which the
5 paperwork allegedly -- and the hit allegedly derived.

6 So if he was, in fact, an active -- played
7 an active role, I think the Court has to employ the
8 balancing test that you talk about in the Aguilar
9 opinion. And that's based on Roviaro. And I think
10 that we've made that showing here today; that not
11 just the identity of Cheech. I mean, that would be
12 great, if we could have the identity of Cheech,
13 certainly that's a starting point. But I'm also
14 still interested in learning the identity of the CHS,
15 to find out if he was, in fact, there; if he was an
16 active participant.

17 THE COURT: But once you get Cheech,
18 though, isn't the CHS like everybody else on the
19 planet? I mean, we'd all like to know who was there;
20 right? What makes you think any more than anybody
21 else on the planet that he was there? It's just
22 speculation, isn't it?

23 MS. HARBOUR-VALDEZ: That's all we have at
24 this point, unfortunately. But if we were able to
25 identify him and interview him, I'm sure he knows

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1 more than what he's provided in this one little
2 statement.

3 And the difference, I think, between a CI
4 and other Jencks witnesses is identity. I mean, we
5 know who the victim is here, but we don't know the
6 identity of the CI. If he was -- like I said, if he
7 was a witness, I think if the Court employs the
8 balancing test, obviously, the nature of the crime
9 charged and the resulting penalties, I think, we get
10 the first prong.

11 His testimony is going to be significant.
12 I mean, he names my client as one of the people
13 responsible for Mr. Sanchez' death. How does he know
14 that? Did he witness it? Was he -- I mean --

15 THE COURT: All right. Anything else?

16 MS. HARBOUR-VALDEZ: No, Your Honor. Thank
17 you.

18 THE COURT: All right. Well, I'm not going
19 to order the production of the CHS at the present
20 time. I'm first going to determine whether the CI
21 analysis is obviated if, in fact, the person is going
22 to be a testifying witness.

23 I will take the Government's suggestion up,
24 and I will determine the CI issue. So I will make
25 the determination.

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1 Right at the moment, I'm going to require
2 the Government to go ahead and give you Cheech. And
3 maybe you'll be able to, after you talk to Cheech,
4 figure out who he is; maybe you'll be able to bulk up
5 your request. And you can send me a letter or
6 something. If you've figured out more information,
7 just tell me: Okay, now, that I know Cheech -- and
8 if you were able to talk to Cheech, maybe you can
9 bulk up your request.

10 Right at the moment, it seems to me the
11 CHS, as far as Troup, may be a little bit on the
12 periphery of just somebody that -- you know,
13 obviously, everybody would like to know who is there.
14 But if I start saying I'm going to disclose every CI
15 to see if they were there, I think I've just pretty
16 much required every CI to be disclosed. So I think
17 it's got to be higher than that.

18 So right at the moment, I'm inclined to
19 leave this one on the Jencks disclosure list, but
20 maybe you can bulk it up with what you get with
21 Cheech. And I'll think about it. I'm not making a
22 final final here, because I don't have to because of
23 this Jencks issue.

24 MS. HARBOUR-VALDEZ: May we also submit
25 additional briefing on the CI analysis, if we're able

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1 to find anything?

2 THE COURT: Yeah, obviously, you can send
3 that to me. And we can talk a little bit about how
4 we want to get that done. But I probably need some
5 help there. I want to think that through. It looks
6 like some thoughtful judges have made their rulings
7 on it. But I want to give it some thought, too,
8 before I just adopt somebody else's analysis.

9 MS. HARBOUR-VALDEZ: Okay. Thank you, Your
10 Honor.

11 THE COURT: All right. Thank you,
12 Ms. Harbour-Valdez.

13 All right. Shall we, then, go to Daniel
14 Sanchez? I think he also is making this request.
15 Mr. Jewkes?

16 Let me ask Ms. Wild, do we have different
17 colors here? This is not my courtroom, so all the
18 usual stuff I have is not here. I'm going to see if
19 I can get a different color. I've got yellow, I need
20 a different color.

21 Mr. Jewkes?

22 MR. JEWKES: Your Honor, I'll be very
23 brief. We did join in on the request. But at this
24 point, I have nothing specific to add as to what's
25 been said by Ms. Harbour-Valdez and Mr. Hammond.

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1 THE COURT: What is your interest in this
2 CHS? What's your involvement?

3 MR. JEWKES: Well, we have an interest in a
4 different CHS.

5 THE COURT: Not this one.

6 MR. JEWKES: Not this one. Counts 6 and 7
7 in 15-CR-4268, with regard to allegations that
8 paperwork came down from the PNM, Penitentiary of New
9 Mexico, to Southern New Mexico, regarding Javier
10 Molina.

11 THE COURT: Okay. Let's separate -- I'll
12 come back to the Molina murder in a moment. So let
13 me deal with Mr. Sanchez. So I take it from that,
14 Mr. Jewkes, you don't need anything on this CHS?

15 MR. JEWKES: That's correct, Your Honor.

16 THE COURT: All right. Let's see. Mr.
17 Lowry, Mr. Baca -- so I'll use the pink highlighter
18 on you, Mr. Lowry.

19 MR. LOWRY: Thanks. I'm not afraid of
20 pink, Your Honor. Neither is the NFL, apparently.

21 Your Honor, I'm going to deviate from the
22 briefing a little bit on the argument we made for the
23 disclosure of this particular CHS.

24 If you look -- Mr. Perez was able to get
25 the identity of the CI because this particular CHS

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1 had alleged that -- if I'm looking at 698-1, on the
2 discovery disclosure, it says, "Rudy Perez, a/k/a
3 Rude Dog assisted in the killing of Javier Molina.
4 Perez provided his walker to make shanks that were
5 used in the murder."

6 And here's why that's critical in terms of
7 Mr. Baca's case. And I'm going to back up and give
8 you the Government's theory, as you had asked
9 previous defense counsel. The Government's theory is
10 this: Mr. Baca is housed in Level 6 at PNM in Santa
11 Fe. And that somehow, yet undisclosed to the
12 defense, Mr. Baca was able to issue paperwork that
13 went from Level 6 to Level 5 at PNM, and then was
14 couriered from Level 5 of PNM down to Southern in
15 order to give the authority to murder Mr. Molina.

16 And according to the discovery, and what we
17 know about Molina, the Government's allegations of
18 the Molina murder, that paperwork arrived on a
19 Friday, and Mr. Molina was killed -- well, the
20 paperwork arrived on a Thursday; it didn't get into
21 the hands of the people in Mr. Molina's pod until
22 Friday, and then Mr. Molina was allegedly killed
23 based on the paperwork.

24 But what this confidential human source
25 indicates is something entirely different, is that

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1 there was a plot to kill Mr. Molina some time before
2 the paperwork ever arrived, was in the equation, or
3 anything.

4 THE COURT: Now, how do you get that out of
5 here?

6 MR. LOWRY: Because it says, "Perez
7 provided his walker to make shanks that were used in
8 the murder."

9 THE COURT: Okay.

10 MR. LOWRY: And I don't think that's
11 something that could have happened instantaneously,
12 even on a good day, with the ingenuity of the best of
13 criminal intent, within the confines of the
14 Department of Corrections.

15 So what this statement indicates to me is
16 that this murder was some time in planning, and that
17 it took a considerable amount of time to manufacture
18 the weapons that were used in the Molina murder. And
19 that the Molina murder couldn't have happened, as the
20 Government has alleged, based on this mythical
21 paperwork.

22 THE COURT: I'm not an expert on shanks,
23 but it doesn't seem to me that it would take that
24 long to get a piece of that metal out of a walker and
25 use it as a shank.

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1 MR. LOWRY: But I think if you look at the
2 shanks that were prepared, that were disclosed in
3 discovery --

4 THE COURT: You've seen them?

5 MR. LOWRY: There are photographs of them.
6 And these are metal rods that have been sharpened,
7 shaven into lethal weapons. And it would take some
8 considerable amount of time, given the limited amount
9 of tools available within the Department of
10 Corrections, to manufacture something of that nature.

11 THE COURT: All right. Go back over it
12 then. Tell me the timeline again, how long it would
13 have taken to make that.

14 MR. LOWRY: Well, Your Honor, I don't
15 have -- at this sitting, I don't have a prison expert
16 or, you know --

17 THE COURT: No, I just meant what you told
18 me earlier. You told me that the paperwork didn't
19 get there until such and such.

20 MR. LOWRY: The Government's theory, as I
21 understand it, is that there were couriers that
22 brought the paperwork down from Santa Fe to Las
23 Cruces; that the paperwork arrived in the possession
24 of two individuals on a Thursday. And just given the
25 nature of prison life, that paperwork was apparently

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1 in their property, and they didn't receive that
2 property until Friday, approximately during the lunch
3 hour, or just after. And that, just after the lunch
4 hour, when this paperwork became available to the
5 individuals who couriered it down, that paperwork --
6 allegedly in the Government's view -- was transferred
7 from one pod to another pod, and then reviewed by the
8 people in that pod who, according to the Government's
9 theory as to Mr. Baca, then murdered Mr. Molina based
10 on this paperwork.

11 THE COURT: So 24 hours to make a shank?

12 MR. LOWRY: Well, that's what -- if this --

13 THE COURT: And there is nothing that
14 indicates that they weren't making shanks before
15 this; right?

16 MR. LOWRY: No. But if you read this, as
17 the CHS conveyed it to the Government, he provided
18 his walker to make the shanks that were used in the
19 murder. So it indicates, I think, as Mr. Villa
20 successfully argued, that if this is just random, and
21 that Mr. Perez just gave his walker over to make
22 shanks just for the general use within the prison
23 pod, then Mr. Perez has -- is not a part of this
24 conspiracy. Because, unless he provided his walker
25 for a specific purpose for this specific murder, then

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1 Mr. Perez has no involvement in this conspiracy, and
2 should be dismissed.

3 But, from my understanding, this CHS is
4 trying to insinuate that Mr. Perez was part of the
5 conspiracy and gave his walker to his co-conspirators
6 for a specific purpose, and that would be to
7 effectuate the death of Mr. Molina.

8 Otherwise, Mr. Perez should be dismissed.

9 THE COURT: All right. Anything else, Mr.
10 Lowry?

11 MR. LOWRY: No -- so I think this CHS would
12 be exculpatory as to Mr. Baca, given that, if the CHS
13 is correct, then this murder didn't happen based on
14 any paperwork. And in fact, as we set forth in the
15 briefing, we don't think this paperwork ever existed.
16 This paperwork is a fiction based on other people
17 that had a motive to create it, you know, to divest
18 themselves from culpability in this case.

19 THE COURT: All right. Thank you, Mr.
20 Lowry.

21 Anybody want to help Mr. Lowry out? Can
22 you think of any argument that would be useful to him
23 in asking for Mr. Baca's defense?

24 Mr. Hammond, you've got your hand up?

25 MR. HAMMOND: Maybe I can save the Court

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1 some time. We are in the same count with Mr. Baca.
2 The story that Mr. Lowry recounted is a story that,
3 in one version of the Government's case, results in a
4 shank being in the hands of our client, and that
5 shank being used to carry out this killing. We have
6 seen discovery in this case that says that the shank
7 or shanks came from the walker. We have seen other
8 discovery that says that the shank or shanks did not
9 come from the walker.

10 For us, we think it's as important for our
11 client -- who is alleged to have been directly
12 involved in the homicide -- to know exactly what
13 Mr. Perez is finding out; who is this CI, and what
14 information does he have that would suggest that in
15 some way that there had been a coordinated plot or
16 plan to kill Mr. Molina?

17 The only evidence we have, other than from
18 a cooperating defendant, is that this homicide was
19 not an ordered hit from on high, but was a result of
20 a beef between two inmates. That would be very
21 important in this case.

22 And as far as I can tell, other than the
23 one cooperating defendant, who is sitting here to my
24 right, there is no other witness that we have been
25 told about who would say that there was a plan or a

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1 plot. And so for us, in the defense of our client,
2 we very much need to know, just as Mr. Perez needs to
3 know, who is saying that these shank or shanks were
4 part of a coordinated plot?

5 THE COURT: Now, Mr. Montoya is accused of
6 actually physically killing Mr. Molina; right? So
7 he's different than Mr. Baca here; right?

8 MR. HAMMOND: The Government's claim is
9 that Mr. Armenta and Mr. Molina apparently both had
10 shanks and joined in the killing.

11 THE COURT: So what are they excusing Mr.
12 Montoya of doing?

13 MR. HAMMOND: I'm sorry, Mr. Armenta and
14 Mr. Montoya, both having shanks.

15 We also, Your Honor, are very interested in
16 knowing whether this man is, in fact, an eyewitness.
17 We have found no other eyewitness who confirms the
18 account given.

19 THE COURT: But again, doesn't that put you
20 then in the same position that I was talking to
21 Ms. Harbour-Valdez about? If everybody is going to
22 be -- if we're going to disclose all CIs, just
23 because we want to find out if they're witnesses,
24 I've lowered the standard, I think, to you get every
25 CI, but you'd also get it of everybody?

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1 MR. HAMMOND: Well, I would hope that the
2 reason that the Government concluded that it would be
3 wise to turn over the identity of the CI to Mr. Perez
4 is the same reason why good counsel, I think, has
5 suggested that the person actually accused of
6 stabbing the victim should have that same
7 information.

8 THE COURT: Well, I guess, you know, the
9 Government can speak for itself, if it wants to. But
10 I would think with Mr. Perez, if I understand his
11 situation, this is the only point -- I guess he's
12 mentioned 18 times, if I recall, in the 40,000
13 pages -- and this is the only thing that is in any
14 way inculpatory of him. And this is it. If this guy
15 is believed, then Mr. Perez was part of the murder.
16 If he's not to be believed, I don't guess there is
17 any other evidence against Mr. Perez. Whereas, it
18 seems that that's a different situation. I probably
19 would have, if the motion would have persisted,
20 required the CI to be made available to Mr. Villa.

21 But it seems to me that you're kind of in
22 the same position that Ms. Harbour-Valdez' client is
23 in, Mr. Troup, as far as just wanting to know whether
24 he's -- this CHS saw this murder.

25 MR. HAMMOND: Well, I don't think that it's

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1 just whether he saw the murder.

2 Maybe it would be helpful to back up for a
3 moment, and recall that this is the case that was
4 prepared to go to trial in state court in the fall of
5 2014. At that time, this witness was unheard of.

6 The only testimony that the State of New Mexico was
7 prepared to offer was the testimony from Mr. Armenta.

8 But we then had that dismissed, and the
9 federal indictment brought. And then, months later,
10 we had Mr. Perez and Mr. Herrera added to the case.
11 They were added, I think from the Government's
12 standpoint, for a reason. Without being able to show
13 that the shank or shanks were themselves part of the
14 planned and coordinated assault, this is just another
15 prison homicide.

16 And so, for the same reason that it was
17 important to the Government to amend its indictment,
18 we think it's important to us, at least for the
19 defendant who is accused of having been involved in
20 the stabbing, to know who it is that says that the
21 shanks were provided for this purpose.

22 THE COURT: All right. Thank you,
23 Mr. Hammond. I'll let -- Mr. Hammond is beginning to
24 argue his interests in trying to get this CHS. I'm
25 still focusing on Mr. Baca's. So does anybody else

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1 want to say anything on Mr. Baca, Mr. Lowry's request
2 for this? Because I see the -- to me, the
3 differences between Montoya and Mr. Baca may be
4 material. Let me see if anybody has anything else
5 they want to say on your request. Then, if you want
6 to say something more -- all right, Mr. Lowry.

7 Mr. Castle wants to say something.

8 MR. CASTLE: Judge, I'll just talk real
9 loud this time.

10 The problem here is a problem that's going
11 to reoccur with all these CIs. And that is that the
12 Government's reports are often devoid of any
13 information as to whether the confidential source has
14 personal knowledge of that which is being reported.
15 So there is no way to determine whether they're an
16 eye and ear witness to a particular thing that
17 they're recounting, whether they're a hearsay
18 witness. And so that's a recurring problem.

19 And so one of the solutions to the
20 problem -- and I just offer this -- is that the
21 Government is probably aware, based upon their
22 interviews with these witnesses, whether they are, in
23 fact, percipient witnesses, or whether they're just a
24 witness that is going to give overall background
25 about the SNM, for example.

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1 So what all these attorneys seem to be
2 getting at is, we don't know whether this is a
3 percipient witness under 613, Federal Rule 613, or
4 whether it's not. And, instead of us all guessing,
5 and finding out perhaps at the last minute, right
6 before trial, that they were a percipient witness,
7 they were aware of exculpatory information, or they
8 heard it through the grapevine, the Government could
9 disclose to the defense who are the percipient
10 witnesses here in these materials. It would cut down
11 on the number of motions to disclose confidential
12 informants considerably.

13 And I just offer that to the Court.

14 THE COURT: All right. Thank you,
15 Mr. Castle.

16 Anyone else helping Mr. Lowry, here, his
17 request? All right. Mr. Lowry?

18 MR. LOWRY: Your Honor, just before the
19 Government responds, I want to follow up with a point
20 that Mr. Hammond made, that I think is deserving of
21 some acknowledgment.

22 As we said in our brief, I think one of the
23 most important -- another important factor to
24 consider, when the Court is deciding to disclose this
25 confidential human source's identity, is the fact

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1 that in the disclosure in 698-1, this individual
2 makes the statement that, had this indictment not
3 happened when it did, that Mr. Baca was going to
4 resurrect the SNM and restore it to its former glory.

5 It's not clear from the report, but the
6 intimation is, in my view, that this -- as
7 Mr. Hammond pointed out -- that this CHS is trying to
8 intimate that the Molina murder was part of a broader
9 SNM predicate act, if you will. And if -- I think
10 the CHS is really saying that it isn't, because this
11 murder was in the plans for a long time before this
12 never-to-be-seen paperwork arrived, then Mr. Hammond
13 is absolutely correct, that this is nothing more than
14 a beef between two inmates that had nothing to do
15 with the SNM.

16 THE COURT: All right. Thank you, Mr.
17 Lowry.

18 All right. Mr. Beck.

19 Put aside Mr. Hammond's interests in this
20 for a second. Let's just focus on Mr. Baca's request
21 for the present time.

22 MR. BECK: Sure. I think what I heard is
23 something about Mr. Baca passing paperwork that made
24 its way down to SNM CF.

25 THE COURT: Why don't you tell me your

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1 theory, tell me the Government's theory of Mr. Baca's
2 role in the Molina murder. Did you disagree with Mr.
3 Lowry's characterization of your case against Mr.
4 Baca?

5 MR. LOWRY: I mean, I guess a little bit.
6 I'm not sure I followed it entirely, and that may
7 have been my fault. I think what's important here --
8 what's most important -- is to, again, go through the
9 Roviaro analysis, and look what this CHS may offer to
10 Mr. Baca. I think that's what the Court looks at in
11 this. And from what I heard, it could offer
12 paperwork -- that Mr. Baca passed that paperwork.
13 But I don't see that --

14 THE COURT: Well, maybe I'm missing
15 something here. But this paragraph as to Molina
16 doesn't talk about paperwork --

17 MR. BECK: Right.

18 THE COURT: -- so the CHS is not -- he's
19 not offering anything, at least in this document,
20 that talks about paperwork. Now, that might have
21 been part of the Freddie Sanchez, but not here?

22 MR. BECK: Exactly.

23 THE COURT: Now, certainly, Mr. Lowry
24 talked about that was your theory against Mr. Baca.

25 MR. BECK: Right. And it is. I mean, that

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1 is the United States' theory.

2 THE COURT: But there is nothing here that
3 indicates the CHS knows anything about that?

4 MR. BECK: Right.

5 THE COURT: But isn't Mr. Lowry's point --
6 what I hear him arguing, at least most forcefully to
7 me, is that -- let's read this sentence probably the
8 way that's most favorable for your case against
9 Mr. Perez. And that is that this walker was
10 specifically manufactured or changed into a tool to
11 murder Mr. Molina. This was a special order. You
12 know, we're going to take this walker and kill Mr.
13 Molina. Why isn't this information fairly important
14 as to Mr. Baca that that simply couldn't have been
15 done in the time frame that the Government's theory
16 is proposing; Mr. Baca couldn't have done that?

17 MR. BECK: Well, I think -- I mean, I think
18 it goes to the importance of -- the significance of
19 the informant's testimony at that point, in balancing
20 the equation. Because I don't think that --

21 THE COURT: Let me spin it out a little bit
22 to see if I can maybe make it important. If your
23 case against Mr. Perez is intact, then doesn't that
24 maybe hurt your case against Mr. Baca, because the
25 timing becomes a pretty important issue there?

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1 MR. BECK: Not necessarily.

2 THE COURT: Not necessarily, but I mean, it
3 could; right?

4 MR. BECK: Right. I think it could. I
5 mean, I think also --

6 THE COURT: I mean, I'm not an expert in
7 shanks, but --

8 MR. BECK: Well -- and I'm not either. But
9 I think if you had shanks lying around --

10 THE COURT: But that's what I'm saying:
11 You can't assume that right now, because the reason
12 that -- your case against Mr. Perez is that it's a
13 special order: Take this walker and kill Mr. Molina.

14 MR. BECK: Right. And so, if we assume
15 that --

16 THE COURT: It's not just lying around.

17 MR. BECK: I guess, if we assumed that --
18 so I guess there is two points. First off, if we
19 assumed that, I don't know what this CHS would offer
20 that others wouldn't. Because I don't think that
21 there is anything in here that indicates he saw the
22 shanks being made, or anything of that nature.

23 Also, the United States' case is that the
24 Molina murder was outstanding for a number of years.
25 It's not as if there was paperwork passed on one day

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1 and it happened the next day. That's not what we are
2 contending here. So I understand the hypothetical.
3 That's not the case that the U.S. is presenting.

4 And I'm going to step back and say that --
5 I guess the second point here was that this was all
6 related to -- and that this CHS may have information
7 about Baca's grand plan to reinvent SNM.

8 Well, as you heard the testimony yesterday,
9 there are multiple sources from which that
10 information is coming. So it's not -- so this CHS's
11 information on that is not significant. There is
12 also a recording of Baca himself who says that that's
13 been provided. So this CHS saying that wouldn't
14 offer anything more significant than Mr. Baca's
15 recorded testimony.

16 So, again, I think that's what the Court
17 has to look at: Is what is the significance of this
18 CHS's testimony? And we're not getting it there.

19 Let me go back for a second and say that --
20 I think the Court was starting to accept the argument
21 that Mr. Perez got the information because there was
22 some Roviaro analysis. We didn't litigate that
23 issue. And Mr. Perez got the information because the
24 United States agreed to give it to him, give it to
25 his counsel. So we don't agree that even Mr. Perez

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1 would have been entitled to his CHS information under
2 the Roviaro analysis. So maybe we should be careful
3 in distinguishing that, too.

4 THE COURT: I know. But I mean, I prepared
5 for this hearing, so I had to make a tentative
6 decision as to what I was going to do on that.

7 All right. Anything else, Mr. Beck?

8 MR. BECK: Not unless you have any
9 questions for me.

10 THE COURT: Thank you, Mr. Beck.

11 Before I let Mr. Lowry have the last word,
12 anybody else? Any other defendants want to comment
13 on Mr. Baca's request?

14 All right. Mr. Lowry?

15 MR. LOWRY: Your Honor, I really don't have
16 anything else to add to the analysis.

17 THE COURT: All right. Thank you, Mr.
18 Lowry.

19 Well, because this is -- I'm going to have
20 to review this in connection with the Jencks, I'm not
21 going to order the production to Mr. Baca at this
22 time. I'll study the legal issue, and see if this
23 requires any CI analysis. But if it does require CI
24 analysis, I'm going to think about it a little
25 further. But I'm inclined to order the production

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1 here because of this timing issue.

2 I realize that there may be strong
3 evidence against Mr. Baca from recordings that links
4 him to this murder. But I need to figure out whether
5 that still undercuts this theory of: Just because
6 the Government has got strong evidence linking him to
7 the murder, if that's his defense, it couldn't have
8 happened: That this information got to him, and then
9 Mr. Perez made shanks out of his walker all within 24
10 hours. It seems to me that that may be the only --
11 since this is the only source of this information to
12 either Mr. Perez or to Mr. Baca, I may need to
13 require its production if I do the CI analysis.

14 MR. LOWRY: Your Honor, if I may?

15 THE COURT: You may.

16 MR. LOWRY: I just want to correct one
17 thing the Court said. There are plenty of recordings
18 involving Mr. Baca. But -- the Government could
19 correct me -- but I don't think there are any direct
20 recordings of him involved in the Molina murder, Your
21 Honor.

22 THE COURT: Is that correct?

23 MR. BECK: It's not correct.

24 THE COURT: That's not correct? You think
25 you have tapes that directly link --

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1 MR. BECK: Tapes have been disclosed in
2 which Mr. Baca admits his involvement in the Molina
3 murder.

4 THE COURT: Okay. And I'll have to see,
5 you know, in a CI analysis, since that really hasn't
6 been briefed, what you may want to do is you may --
7 you know, I'm probably the only person in the room
8 that doesn't have a tablet or this 40,000 pages of
9 information. So you may need to help me with that
10 point, what evidence you have; if you think that
11 vitiates your need to produce it. Because you've got
12 strong evidence linking, does that undercut Mr.
13 Lowry's argument?

14 MR. BECK: And also, as I said, Your Honor,
15 the United States' theory is that -- the evidence
16 that we've produced shows that the Molina hit was
17 outstanding. So if it was a direct order, it wasn't
18 24 hours later that the shanks were produced and the
19 inmate stabbed. I understand that that's Mr. Baca's
20 theory. That's not the United States' theory.

21 THE COURT: Your theory is not that there
22 was this paperwork that worked from PNM down to
23 Southern?

24 MR. BECK: Not in one day. That is the
25 theory that the paperwork came down from (sic)

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1 Southern. But I think that is --

2 THE COURT: From PNM?

3 MR. BECK: Right.

4 THE COURT: Came from PNM?

5 MR. BECK: From PNM to Southern. It worked
6 its way down. And it may have been quick. But the
7 hit on Molina was outstanding for years before he was
8 actually murdered.

9 THE COURT: And if that's the Government's
10 theory, then why would you -- why, Mr. Lowry, would
11 you want it to be something else? This short time
12 frame? Where is that coming from? I mean, you don't
13 have a theory -- I mean, you're the defense lawyer;
14 you don't have a theory of how your client murdered
15 this person, you have to respond to their theory.

16 MR. LOWRY: Correct. And their theory is
17 this homicide was instigated by paperwork that,
18 frankly, just doesn't exist.

19 THE COURT: Well, okay. But the reason I'm
20 leaning toward, or was five seconds ago leaning
21 toward granting your CI, was because of this time
22 frame. But if their theory is that the order was
23 long ago, what is it that you would support that it
24 was a tighter time frame, and you need this to
25 establish that it physically couldn't have been done?

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1 MR. LOWRY: Well, then, Your Honor, I think
2 the theory is that the Molina hit was years ago
3 maybe -- I think Mr. Molina would have been dead
4 years ago under the Government's theory of the case.
5 It still doesn't vitiate the fact that what this CHS
6 is saying is that these weapons were manufactured
7 "Johnny on the spot" to murder Mr. Molina. And that
8 time line doesn't alter -- is not altered at all,
9 because, even though they may have evidence that
10 somebody in some distant past wanted Mr. Molina dead,
11 according to the CHS, had no way to clairvoyantly
12 predict this paperwork would have arrived the next
13 day, and so they had to post-haste construct these
14 shanks for this specific murder.

15 THE COURT: All right. Well, you both know
16 what I'm thinking, and what I think is the critical
17 point here. So if there is some particular discovery
18 that you want me to stare at before I make a final
19 decision on the CI analysis, then you probably know
20 what to get me. Is that clear enough, Mr. Lowry?
21 You know what I'm thinking?

22 MR. LOWRY: Yes, Your Honor, I do.

23 THE COURT: And you know -- and I wouldn't
24 mind seeing -- if you think if -- this seems to be
25 news to Mr. Lowry, so he'd probably like to see it,

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1 too. If you've got something specific, as far as
2 recordings or something that link Mr. Baca up to the
3 Molina hit orders, then I guess I'd like to see that.
4 Because, if I go into the analysis and think this
5 information is just cumulative, I would think that
6 would be part of CI analysis.

7 MR. BECK: Right, Your Honor. And that's
8 what I was saying. I think we got confused because
9 we started off with your hypothetical. That's what I
10 was trying to say is that that's not what the
11 Government -- and so, what I understand Your Honor to
12 say is that you'd like at least a little supplemental
13 briefing from Mr. Baca and from the Government with
14 evidentiary basis.

15 THE COURT: Maybe evidence, the evidence.
16 Because it doesn't seem to me to make sense. I mean,
17 Mr. Lowry -- he has no incentive to think up a theory
18 how Mr. Baca killed Mr. Molina. So he's got to
19 respond to yours. So it seems to me we just take
20 yours. And then, if it's not helpful to Mr. Baca in
21 trying to defend against that theory -- I thought for
22 a second the time frame might be, and Mr. Perez'
23 involvement coming from this one CI.

24 All right. So y'all understand?

25 All right. Where are we on time?

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1 Let's see, let's go to -- let's go another
2 15 minutes.

3 Let's see if we can squeeze in Carlos
4 Herrera's request for this CHS's identity.

5 Mr. Davis?

6 MR. DAVIS: Judge, Michael Davis. I'll try
7 and be brief. Mr. Herrera is also charged in Counts
8 6 and 7, the murder of Javier Molina. Like Mr. Perez
9 and like Mr. Baca, he was not directly involved in
10 the homicide. And he was actually housed in a
11 connecting cell block called A pod. The murder
12 occurs in B pod. And so we have been trying to
13 determine the Government's theory concerning Mr.
14 Herrera's involvement in that murder. We have the
15 documents and the discovery reviewed so far --

16 THE COURT: Let me stop you right there.

17 Mr. Beck, are you going to take this?

18 MR. BECK: Yes, Your Honor.

19 THE COURT: Do you mind telling what you
20 think -- how you think that Mr. Herrera was involved
21 in the Molina murder, what's your theory?

22 MR. BECK: Someone else might take the
23 factual part of this.

24 THE COURT: Okay. Ms. Armijo?

25 MS. ARMIJO: Your Honor, Mr. Herrera was

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1 involved -- we have recordings and admissions from
2 him as to his involvement. He basically sanctioned
3 the hit as well, and given it, but --

4 THE COURT: Is he like an officer or a
5 higher up? Or what does sanction mean?

6 MS. ARMIJO: He had to approve it.

7 THE COURT: And that's because he's higher
8 up in the organization?

9 MS. ARMIJO: He was in a higher position
10 than the ones that actually did the murder.

11 THE COURT: All right. So you're not
12 alleging that Mr. Herrera was physically involved in
13 the killing?

14 MS. ARMIJO: No.

15 THE COURT: Did he shank, manufacturing or
16 paperwork, or anything like that? All he did was
17 just say, Yeah, that's a good thing, let's kill
18 Molina?

19 MS. ARMIJO: Approval, approval that was
20 necessary. And we have -- and as far as the strength
21 of his case, we have already disclosed a recording
22 that he made which he details his involvement.

23 THE COURT: Involvement, okay. Is that
24 helpful?

25 MR. DAVIS: Well, yeah, except for the fact

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1 that I've reviewed many of the recordings. And I'm
2 probably as surprised as Mr. Lowry was that I don't
3 recall that -- any recording where he's admitted to
4 being involved in the Molina murder. But having said
5 that, we did suspect that it was their theory that he
6 was somehow involved in giving a nod or some sort of
7 sanction.

8 THE COURT: So it's approval; he's not
9 physically doing anything?

10 MR. DAVIS: Right. He's in another
11 completely different cell block, Judge. And the
12 evidence would be from the main witness, Mr. Armenta,
13 who apparently receives information that he had seen
14 Carlos talking through a door that separates the two
15 cell blocks to another inmate.

16 But the curious thing about it, and the
17 reason why we're requesting disclosure of this
18 particular CI, is because if, in fact, Mr. Herrera
19 was a higher ranking member of SNM, that should have
20 been mentioned by the CI in this report. Because,
21 not only does he have intimate knowledge of the
22 homicide, because of the shanks that were allegedly
23 provided by Mr. Perez, but he goes on to say about
24 how he knows -- this CI knows Mr. Herrera's mother.

25 Now, a search warrant was executed on Mr.

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1 Herrera's mother back in March. It appears that Mr.
2 Herrera's mother has been involved in drug activity
3 for many, many years; decades. And apparently, they
4 allege, the Government alleges that during the course
5 of those years, that she and various family members
6 have been providing sources of heroin to the various
7 prison facilities.

8 And so, when I reviewed the discovery, what
9 I've reviewed is about 15 documents that make mention
10 of Ms. Herrera, and almost all of them relate to
11 family members, or involvement in this drug dealing.

12 There is no documents that were received
13 that anywhere classifies Mr. Herrera as a high
14 ranking SNM member, a leader or a shot caller, except
15 for one document where another CI -- perhaps this
16 one, we don't know -- alleges that he was running a
17 yellow pod, which we believe is basically A pod, the
18 pod that he was in.

19 So it's our position that, because of the
20 fact that there is so scant evidence in the discovery
21 provided regarding anything involving the Molina
22 murder with Mr. Herrera, there are discovery involved
23 implicating him and his particular involvement, or
24 his family's involvement, in drug dealing over the
25 years. This spans over a 15 year period. So some of

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1 the reports relate to things that happened in 2008.

2 But over the years, his mother -- he's got
3 brothers that are in the prison facility -- and so
4 when a brother is mentioned, they'll say the brother
5 of Carlos SNM member, Carlos Herrera; that's how his
6 name has been popping up. But nowhere have we
7 identified anything that clearly acknowledges Mr.
8 Herrera as some kind of a shot caller in A pod.

9 So it's our position that, because this
10 particular CS notes that he has intimate knowledge of
11 what happened when the Molina murder -- but also
12 knows Mr. Herrera's mother -- knows that he's who he
13 is, and worked his mother, it makes sense, and only
14 follows that if he was giving information, which he
15 does in this report that you have in front of you --
16 he's giving a litany of information to the feds about
17 various people -- it certainly follows that when he's
18 talking about Carlos Herrera, he's going to say, Oh,
19 by the way, Mr. Herrera runs A pod. Mr. Herrera was
20 the one who gave a nod, or somehow sanctioned the
21 killing of Mr. Molina. And it's not mentioned there
22 in any way.

23 And so that fact alone tells us that's
24 exculpatory. Because it's our position he's not a
25 shot caller. That, in fact, he didn't sanction any

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1 homicide. In fact, he wasn't involved at all in the
2 murder. He's a bystander. He was aware of it when
3 it occurred. But he's not a shot caller in any way.

4 And it's our position that that is
5 exculpatory. If we had the identity of that CS, we
6 could obviously talk to that person, and, in fact,
7 verify that Mr. Herrera is not who the Government
8 thinks he is. Otherwise, he would have said so in
9 this report. That's why we're requesting disclosure
10 in our motion.

11 Thanks, Judge.

12 THE COURT: All right. Thank you, Mr.
13 Davis.

14 Mr. Beck -- let me ask, anybody else want
15 to help Mr. Davis out, help him get this?

16 All right. Mr. Beck? Probably for my
17 record, I should have asked you this the first time
18 we do this. Why does the Government not want to
19 disclose CHS to these people?

20 MR. BECK: To protect the CHS's safety,
21 Your Honor.

22 THE COURT: And tell me why you're
23 concerned about his safety.

24 MR. BECK: The way the SNM operates is to
25 put out hits, or whatever you want to call it, hits;

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1 whether it's assaults or whether it's murders on SNM
2 members who give statements to law enforcement or
3 anything like that. So the fact --

4 THE COURT: So your reason is for his
5 physical safety?

6 MR. BECK: That's right, Your Honor.
7 Physical safety. The fact that this document that
8 we're looking at 698-1 exists puts him in harm's way
9 in this particular case.

10 THE COURT: And Mr. Davis' particular
11 request on behalf of Mr. Herrera?

12 MR. BECK: So what I think -- I mean, I
13 think Mr. Davis is asking to impeach by omission --
14 which is appropriate when you're at trial, to go
15 against this witness, or even if we're talking about
16 some hypothetical CI that it's not this person, and
17 to say in this report: You mentioned his mother, but
18 you never mentioned him; you never say that he's a
19 captain, did you? And you can do that. But that
20 does not play into the calculus under Roviaro,
21 whether this informant has -- should be disclosed,
22 and has testimony that should be substantial help to
23 Mr. Herrera. And there is nothing indicated on this
24 document that he does. The fact that he didn't call
25 him a captain, while notable, is not going to provide

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1 anything that hasn't been provided in the discovery.

2 And in fact, as we just saw it, it may already be
3 helpful to Mr. Herrera in the form that it exists
4 now.

5 When we're looking at the Roviaro analysis,
6 certainly, the fact that someone isn't mentioned
7 doesn't require counsel for disclosure of the CHS. I
8 don't know if you have --

9 THE COURT: I don't. Thank you, Mr. Beck.

10 Anyone else want to speak before Mr. Davis
11 gets the last word on his request?

12 All right. Mr. Davis?

13 MR. DAVIS: Well, Judge, it may be
14 impeachment by omission, but it's real important
15 impeachment. There is no evidence that he was
16 involved in the murder. And their theory is that he
17 was --

18 THE COURT: You may want to talk to them
19 after this to get the specific Bates number, whatever
20 they're looking at.

21 MR. DAVIS: Could I borrow your pink
22 highlighter?

23 THE COURT: You're welcome to it. Doesn't
24 work very well. It's a Government issued pink. I
25 can't get much ink out of it.

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1 MR. DAVIS: I will do that, I will make
2 that call.

3 But aside from what they have said, I
4 haven't seen it; my defense team hasn't seen it. I
5 wouldn't make these assertions, Mr. Lowry wouldn't
6 have made these assertions if we'd have seen this
7 information. I wish I'd have been --

8 THE COURT: I recall at a hearing that they
9 indicated that they were willing to match some --
10 correct me if I'm wrong -- if the defendants want
11 some specific matching of defendants to the evidence,
12 y'all were willing to do that. Am I just imagining
13 that, or did y'all actually say that?

14 MS. ARMIJO: Well, we said it in the Garcia
15 context, because it was the drug case. And they were
16 saying that they were lost. I don't know what Mr.
17 Aoki does with this evidence. I know that when we
18 disclose it, despite what people say here, it is
19 listed out by the murders and everything else. I
20 know that at the last hearing Ms. Strickland was
21 saying she didn't have anything disclosed to her.
22 And during that very hearing, as to the Molina case,
23 we got confirmation from Mr. Aoki that it had been
24 disclosed twice. It was in the evidence.

25 THE COURT: But I mean, I guess what I'm

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1 sort of asking is, are Mr. Lowry and Mr. Davis free
2 to call you or Mr. Beck, and say: You mentioned at
3 the hearing specific recordings that link us to the
4 Molina murder; and then, in Mr. Baca's case,
5 specifically to the Sanchez murder, can you point out
6 those recordings? Would you be willing to link those
7 up for them?

8 MS. ARMIJO: Your Honor, that's a slippery
9 slope. Because in this case, we -- the whole point
10 of the discovery coordinator is that we would not be
11 fielding questions like this. That, when they had
12 issues, they would go to --

13 THE COURT: But this, to me, is not
14 asking -- you know, I'm not so interested in you
15 producing the material, but just -- I'm asking -- for
16 example, I'm asking Mr. Beck to tell -- to show me,
17 for example, what he thinks is strong evidence of Mr.
18 Baca's involvement in Mr. Sanchez' death. He said he
19 would. Same token, would he be able to do that if
20 Mr. Lowry called him and said, Hey, you mentioned
21 that, you're going to give it to the judge, can you
22 tell me?

23 MR. BECK: Your Honor, no -- I mean, and I
24 say no because it's not an issue in front of the
25 Court. We've been willing to work with defense

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1 counsel on many of these issues. But we can't go to
2 the extent that we're fielding calls from defense
3 counsel telling them what the evidence is against
4 them. They have the evidence disclosed. They asked
5 for the 10,000 pages that we just disclosed from the
6 FBI files that we don't think is material, because
7 they asked for it, because we agreed to disclose it,
8 because Your Honor asked us to.

9 But we will not -- and I appreciate that
10 it's a hard position to be in, but if there is a
11 motion to disclose a CI, which there is here, and
12 they come forth with some basis that the CI should be
13 disclosed -- which they did -- we can rebut that with
14 evidence. And then certainly, it ferrets it out.
15 And I appreciate that that puts a burden on the
16 Court. It puts a burden on us. And it may be easier
17 to field phone calls. But we just can't go down that
18 slope.

19 I think in Ms. Strickland's case, she
20 pointed out to us, Here's eight recordings, I
21 listened to these. They're not in it. And we
22 looked. A couple of them were, a couple of them
23 weren't. And we've worked that out.

24 So I think my position in this has been
25 consistent that the United States will work with

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1 attorneys when they come with some factual basis as
2 to what they need. And I don't think we've changed
3 that position. But when they come, and they ask for:
4 You said this at the hearing, where is the evidence
5 of this, we can't go down that road. And we
6 certainly can't go down: I'm looking for this
7 evidence, can you point me to it? And so I just
8 don't think that's a point we're willing to give on.

9 THE COURT: Well, let's stick to the issue.
10 I guess I've been around long enough that I remember
11 the days when this U.S. Attorney's Office would hand
12 you a book, and say, Here's the evidence against you,
13 and it was fairly clear as to what their theory
14 against you was. But I can't tell the Government how
15 to prepare their case, but -- well, let's move on to
16 this issue, Mr. Davis. We're not going to solve that
17 problem.

18 MR. DAVIS: Judge -- and I have to say I
19 miss those days as well. And it seems like I should
20 get one phone call to the Government, isn't asking
21 that much.

22 THE COURT: Well, they didn't say they
23 wouldn't take your calls.

24 MR. DAVIS: I'm not asking for everything.
25 I just want that one recording to be identified, if

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1 they have such a recording, which I assume they do.

2 But just to highlight, Judge, if their
3 theory is that he's a shot caller, that he's in upper
4 management or some kind of a -- in a leadership
5 position in SNM, and he was in that position on the
6 day that the murder occurred, then this confidential
7 human source would have identified him as such. And
8 he didn't do so here. And so we ask that, obviously,
9 that would be exculpatory, because it's our position
10 that he's not. And that's why it wasn't disclosed
11 here. He's not a leader. He's not a shot caller.
12 And he doesn't run any pod.

13 Thank you.

14 THE COURT: All right. Thank you,
15 Mr. Davis.

16 Well, I probably am not going to start
17 disclosing CIs because of what's not in these case
18 reporting documents or CHS reporting documents. I'm
19 a bit of a proponent of the dog doesn't bark theory
20 from time to time. But it's probably got to be
21 stronger than that. So I probably am not going to
22 make the Government disclose CHSs on what's not in
23 these reports without a stronger showing.

24 All right. Well, I propose we go to lunch,
25 come back at 1:00. Take your request on behalf of

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1 Mr. Montoya. That would be a short lunch, wouldn't
2 it. Let's shoot for 2:00, 2:05. Obviously, nobody
3 is going to start without anybody. And it takes a
4 while to get in and out. So eat your meal. We'll
5 come back and we'll get started around 2:05,
6 somewhere around there. All right. Appreciate your
7 hard work. See you this afternoon.

8 | (The Court stood in recess.)

9 THE COURT: All right. Mr. Romero, are you
10 on the phone? Mr. Romero, do you have your mute
11 button on?

12 MR. ROMERO: I am here, Judge. My
13 apologies, I am here.

14 THE COURT: Where are you, Mr. Romero?

15 MR. ROMERO: I am in Moriarty, New Mexico.

16 THE COURT: You told me this morning about
17 9:20 that you were an hour out. Why are you not
18 here?

19 MR. ROMERO: I'm having car trouble, sir.
20 My apologies.

21 THE COURT: All right. Mr. Hammond, do you
22 want to take up -- you've given me a preview of Mr.
23 Montoya's request. Anything else you want to tell me
24 now that I'm focused on Mr. Montoya, rather than
25 still focusing on Mr. Lowry and Mr. Baca.

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1 MR. HAMMOND: Yes, Your Honor, and first,
2 my apology. I didn't really realize that I was
3 taking things out of order.

4 THE COURT: It's just my mind. I've got to
5 focus on each one of these defendants one at a time,
6 so --

7 MR. HAMMOND: Well, I think that with
8 respect to this particular disclosure on this CI, the
9 position we're in is very much like the one that Mr.
10 Baca's attorneys find themselves in.

11 Let me go back to something that the
12 Government said this morning, and see if we can get
13 some common understanding. The understanding that
14 we've had, at least among the defendants who were
15 involved in the Molina counts, is very much like what
16 Mr. Lowry summarized this morning.

17 THE COURT: That was your understanding;
18 when you heard him explain the Molina situation, you
19 thought it was sort of somebody like Mr. Baca, about
20 a week out before his death, Mr. Molina's death,
21 found out that there was cooperation, and it was a
22 pretty quick order to kill?

23 MR. HAMMOND: I don't even think it was a
24 week, Your Honor. I think what we have been told is
25 it was a matter of a day or two.

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1 THE COURT: What were you looking at or
2 hearing or thinking to draw that conclusion rather
3 than the one that the Government is saying today?

4 MR. HAMMOND: Well, that is the account
5 that is contained, I think, in several 302s that
6 we've been given. But it also is consistent with the
7 statements made by the Government's cooperating
8 defendant, Mr. Armenta, who says that he was ordered
9 to do this hit; that the order had come down on high;
10 that he had no opportunity to think about it or talk
11 about it; that it had to be done, and done right now.

12 THE COURT: This is what Mr. Armenta had
13 said?

14 MR. HAMMOND: Yes.

15 THE COURT: And Mr. Armenta's role is that
16 he was physically involved in the killing?

17 MR. HAMMOND: Mr. Armenta, from what we can
18 tell, was the principal and, we believe, only killer;
19 that is, that he shanked Mr. Molina in a room that
20 we're going to see on Friday, thanks to the Court.
21 And that he then came down the stairs, and that he
22 was again assaulted by Mr. Armenta.

23 THE COURT: Say that again. I missed it.

24 MR. HAMMOND: So the account that we've
25 seen -- and it's in videos -- is that there was some

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1 kind of an altercation in a cell on the second floor;
2 that after that altercation, Mr. Molina came out.
3 You can see in the video that there is blood on his
4 chest. He goes down the steps, both -- my client
5 happens to come down the steps, Mr. Armenta comes
6 down. My client has a very brief fist-to-fist
7 encounter at the bottom, no shank. And Mr. Armenta
8 comes down. And you can't see exactly what's going
9 on in the corner, because the camera isn't there.
10 But the bottom line of this is that Mr. Molina is
11 shanked something like 40-something times. And then
12 he dies there at the bottom of the steps.

13 Now, the account that we've been given is
14 that all of that was arranged essentially overnight;
15 that Mr. Baca had given some order; that there was
16 paperwork, the paperwork was brought down from Santa
17 Fe, just as Mr. Lowry summarized it this morning.
18 Somehow that paperwork had been passed between A pod
19 and B pod, and the instruction had been given to
20 carry out this hit right now.

21 THE COURT: Is the story, though -- is what
22 the Government is saying today inconsistent with this
23 story, in the sense that Mr. Baca could have said two
24 years earlier, "Kill Mr. Molina," but then there was
25 some urgency, and they just got it done?

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1 MR. HAMMOND: Right, and that's a really
2 interesting question. I think you and I are focused
3 on exactly what, to me, makes this shank, or shanks,
4 so interesting. I would say it's not, in theory,
5 inconsistent that there had been some outstanding
6 order, an outstanding order for three years, that had
7 not been carried out, or at least in theory an order
8 could be given, Hey, carry out that hit.

9 But if that's the case, how do you explain
10 the shank or shanks? How do you charge Mr. Perez
11 with having made shanks to be used in this killing
12 if, in fact, it is true that there was an order from
13 on high that was filled out immediately?

14 I'm not a shank expert, but I can tell you,
15 from having done a lot of prison cases, that it's
16 extremely unlikely that one can dismantle a
17 wheelchair, pull off the metal that allegedly is
18 needed, and turn it into a very sharpened weapon in a
19 matter of, essentially, no time.

20 THE COURT: Okay. Let's say you've drug me
21 back to where I was when I was talking about Mr. Baca
22 and Mr. Lowry. How does that help Mr. Montoya,
23 though?

24 MR. HAMMOND: Because we haven't asked
25 about our understanding of what happened.

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1 THE COURT: Okay. Tell me that.

2 MR. HAMMOND: Ours is that there was a
3 beef, apparently between Mr. Armenta and Mr. Molina;

4 that it was not something that came down on high.

5 That it was the kind of thing that happens. There
6 are reasons -- and I won't go into them now -- but
7 there are reasons why Mr. Armenta and Mr. Molina were
8 not getting along. And so something happened between
9 those two men. My client was there. You can see on
10 the video, he was present for part of it. But he was
11 not a participant. There is no DNA on him, on our
12 client at all, of this bloody victim. There is none
13 of our client's DNA on the victim. And so we have
14 thought -- and have thought from the beginning, this
15 is not new information -- we thought that the
16 Government just got this wrong; that this was a beef
17 between two men, one of whom is dead, and the other
18 of whom chose to cooperate, and is now telling a
19 story which, with respect, I would say is false.

20 But the shank is a huge part of that story.

21 Where did the shank come from? Who ordered it? If
22 that shank was ordered from on high to be used, how
23 did they get that in a day?

24 And so now we have a second informant.

25 This is the first time we had heard that there was a

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1 second informant.

2 THE COURT: Wait. Who is the second, who
3 is the first?

4 MR. HAMMOND: He's the one that we're
5 talking about now. Mr. Armenta was the first.

6 THE COURT: Oh, okay. All right.

7 MR. HAMMOND: And for a long time we
8 believed he was the only one.

9 THE COURT: Okay.

10 MR. HAMMOND: Now, we're told in this 302
11 that there was a second cooperator who told the story
12 about Mr. Perez. And I think that's a critical link
13 in the Government's account of this hit having been
14 ordered by the gang.

15 THE COURT: All right. Well, help me a
16 little more with your client. Neither your version
17 or, I guess, the Government's version is going to be
18 that Mr. Montoya had a shank?

19 MR. HAMMOND: Well, I don't know what the
20 Government's version is. I expect that the
21 Government will say that there was more than one
22 shank, which is why I say, "shank or shanks."

23 THE COURT: But right now -- and maybe Mr.
24 Beck will get up, or whoever, and tell me that he's
25 going to link some shanks with Mr. Montoya. But I'm

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1 hearing a story that doesn't have anything to do with
2 the shanks and Mr. Montoya. So tell me how Mr. Perez
3 is making shanks out of a walker, how that --
4 disclosing the CHS on this is going to help you in
5 any way.

6 MR. HAMMOND: As far as we know, based upon
7 the discovery we've been given in this case -- and I,
8 like every other lawyer here, can't tell you that
9 I've looked at every piece of paper -- but on this
10 topic we've tried to be pretty careful. And our
11 understanding of the evidence is to the extent that
12 there were shanks, they are now saying that these
13 shanks came from the wheelchair or walker or the
14 wheelchair program. And now we have a witness who
15 says that that's the case.

16 THE COURT: Okay. Tell me how that would
17 help you with Mr. Montoya's defense.

18 MR. HAMMOND: Well, because Mr. Montoya's
19 defense is that he was not a part of any plan at all;
20 that he was, as I said earlier, merely present. And
21 yet now we're hearing that part of the plan was that
22 Mr. Perez would provide shanks. And if there are
23 two, then apparently shanks both to Mr. Montoya and
24 Mr. Armenta to commit this crime.

25 THE COURT: So you're asking for the

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1 identity of this confidential informant because
2 you're saying that he can be a source of saying there
3 was a plan, as opposed to there not being a plan;
4 this just being a feud between Mr. Armenta and Mr.
5 Molina. Is that --

6 MR. HAMMOND: I don't know all the things,
7 obviously --

8 THE COURT: Well, I know, but I mean --

9 MR. HAMMOND: -- he would say.

10 THE COURT: -- that's what you're saying
11 this would help you establish is the absence of a
12 plan.

13 MR. HAMMOND: Well, I think knowing that
14 there is some witness out there who says that there
15 was a direction that Mr. Perez create shanks to be
16 used in this homicide is very important to us. That
17 will be important evidence to the Government at
18 trial. It is one of the very few things that I've
19 heard that would link our client to that homicide.
20 If, in fact, the witness says: I didn't know
21 anything about what was going to be done with these
22 shanks, I didn't get an order from somebody --

23 THE COURT: Who would be saying this?

24 MR. HAMMOND: Well, I don't know what the
25 CI is going to say, but -- all I have is one sentence

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1 that we've read several times this morning. I don't
2 know what he's really going to say. But all I know
3 is that the story we have heard for -- now for
4 several months, is very inconsistent with the idea
5 that someone instructed Mr. Perez to make shanks to
6 be used in the Molina homicide.

7 THE COURT: Okay. Anything else, Mr.
8 Hammond?

9 MR. HAMMOND: Well, you know, I was
10 concerned this morning about topics that I think you
11 believe are in the nature of what you would get with
12 Jencks material. And I would like to know, was he
13 present? I'd like to know what else he may think he
14 knows about this homicide. We don't have any other
15 eyewitnesses, other than the defendants in this case.
16 So if there is somebody there, I'd like to know that.
17 But my primary concern is with what he has to say
18 about the shank or shanks.

19 THE COURT: All right. Thank you,
20 Mr. Hammond.

21 Any other defendants want to help
22 Mr. Hammond out, think of something they can think of
23 as to why this CHS would be important to Mr.
24 Montoya's defense?

25 All right. Mr. Beck. I've got to tell

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1 you, when I've got two people like Mr. Hammond and
2 Mr. Lowry saying they thought all along that the
3 Government's case was that this was thought up in a
4 compressed period of time, you know, I guess I would
5 draw from that that there is something in the record
6 that would support that theory.

7 MR. BECK: Sure. I think, Your Honor, if
8 you look at Document 762, which is the reply brief,
9 page 6, as it goes to Mr. Herrera, in the first
10 paragraph it says, "To date, the only evidence that
11 tends to implicate Mr. Herrera comes from the
12 Government's main witness, Jerry 'Creeper' Armenta."
13 So I think --

14 THE COURT: Which line are you looking at?
15 Right in the middle?

16 MR. BECK: Right in the middle, right.

17 THE COURT: Let me read it, now that I see
18 it. Okay.

19 MR. BECK: So I think, first of all, going
20 back. As I said earlier, we need to be careful here.
21 Mr. Armenta is not a Government witness, he's not a
22 cooperator, he doesn't have an agreement with the
23 Government. So I take issue with that assertion.

24 What I will say is that our theory of the
25 case is that Mr. Armenta, lower down in the SNM, as

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1 Your Honor just pointed out to Mr. Hammond, receives
2 an order that says, "Kill Mr. Molina." So, what I
3 can surmise is that Mr. Armenta's testimony that
4 everyone refers to -- but obviously isn't attached
5 here, because everyone knows who Mr. Armenta is, so
6 there is no need to disclose him as a CI; he is not a
7 CI -- is that he got the order to kill Mr. Molina,
8 and he and Mr. Montoya did so. I'm sure that's what
9 it says.

10 So I think, if Mr. Hammond says you're
11 walking around kind of full circle with him, it's
12 more plausible, in fact, that the Government's theory
13 is correct; that there was a hit out on Mr. Molina
14 for a long time, and that maybe Mr. Armenta's account
15 fits in perfectly with that; that when he got the
16 order, he was a good soldier and he killed Mr.
17 Molina. I think that's where this disconnect --

18 THE COURT: How do you fit Mr. Perez, then,
19 in?

20 MR. BECK: Mr. Perez supplied -- as I think
21 this sentence says in Document 698-1, Mr. Perez
22 provided the walker for the shanks to be made. I
23 think that the shanks could have been made in an
24 hour. But I think, when the shanks were made, by
25 whomever they were made, could have happened, months,

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1 years; I mean, it could have happened before
2 Mr. Armenta received the order to hit Mr. Molina.

3 So --

4 THE COURT: Well, does your version or your
5 theory of the case involve papers?

6 MR. BECK: Yes.

7 THE COURT: That papers came from Mr. Baca
8 to the Southern facility?

9 MR. BECK: Yes, Your Honor.

10 THE COURT: Was it that week?

11 MR. BECK: We do not believe it was that
12 week.

13 THE COURT: You think it was long ago?

14 MR. BECK: It was long before that.

15 THE COURT: So what you're currently
16 planning to tell the jury is that a year or two
17 before this murder, Mr. Baca gave orders to have Mr.
18 Molina killed. And then a foot soldier, Mr. Armenta,
19 just found out about it on Thursday, and killed him
20 on Friday?

21 MR. BECK: Something to that effect, yes.

22 I mean, that's much more analogous to our theory than
23 the 48 hours.

24 THE COURT: And Mr. Perez, was he working
25 on shanks for two years, one week, 24 hours? How

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1 does he fit into that picture?

2 MR. BECK: I don't know offhand. I don't
3 know if there is more --

4 MS. ARMIJO: Your Honor, your version is a
5 simplified version. There are other players. Mr.
6 Sanchez is charged with this murder, Mr. Herrera.
7 There is a lot of players in this case that come into
8 play. But our theory is basically that this hit had
9 been out on Mr. Molina for some time. We have
10 Anthony Baca admitting to this on a recording, that
11 has been disclosed, about how this hit had been
12 carried out, and why it was necessary to carry it
13 out, and his involvement. We have Mr. Herrera, who
14 his involvement was basically saying he wanted to
15 make sure and see the paperwork, to make sure that
16 the hit was a valid hit, because they wanted to
17 basically make sure it was righteous, so to speak.
18 And we have him on recording saying that.

19 THE COURT: What is that supposed to mean?

20 MS. ARMIJO: I'm saying righteous. That
21 it's a validated hit; that it's not just a hit. I
22 think one of them says that it's not a hit for
23 personal reasons; it's a hit for violation of SNM
24 protocol, which would be being an informant, as
25 opposed to having a personal beef with somebody.

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1 They wanted to make sure that this was the correct
2 hit.

3 Mr. Sanchez comes into play, and you can
4 see him on the video, because out of the people that
5 we're talking about that are there at Southern, he
6 probably has the most highest rank. He was in charge
7 of that area. We believe that Mr. Sanchez went and
8 told Mr. Armenta and Mr. Montoya: You're doing this
9 hit. You haven't put in your time, you haven't done
10 your bones for the SNM. You guys are going to be
11 doing this.

12 There were three shanks that were actually
13 recovered; not one, not two, but three shanks during
14 this investigation afterwards.

15 I believe on the videotape Mr. Montoya is
16 seen assaulting him. And despite Mr. Hammond's
17 rendition of it, I believe on the videotape, you can
18 actually see Mr. Montoya handing a shank over to
19 Mario Rodriguez, who then goes and hides the shanks.

20 So there is a lot more to the videotape.
21 We have videotape. We have statements from Mr.
22 Montoya, Mr. Armenta. After this incident we have
23 cooperators that occurred -- that have given
24 statements, obviously, like the one we have here,
25 that know about it. And we have recordings from

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1 three defendants to CHSs that were made, with them
2 not knowing that they're talking to cooperators while
3 they're incarcerated. So there is many moving parts
4 to this. There is three shanks; there is videotapes.
5 And this order had been outstanding for a long time.

6 With the SNM, an order can be outstanding
7 for a very long time. Case in point: Julian Romero,
8 a victim in -- I don't know what count he is in
9 actually, now -- but there is a defendant here that's
10 charged with his assault. But that hit came out --
11 like, I think it was valid for over a decade. They
12 tried to shoot him once, and that didn't work. But
13 that hit was valid. And the person that put that hit
14 out actually took a guilty plea and admitted that hit
15 was valid, it was outstanding for over a decade. And
16 that's basically the way it works.

17 And we have this from numerous cooperators
18 as to, once a hit goes out, it's out. The people who
19 actually do the hit, though, really want to make sure
20 that it's still good. And that's probably what
21 happened in this case.

22 So, yes, we believe there is paperwork. We
23 believe it happened some time ago. Mr. Perez --
24 we're not saying Mr. Perez necessarily made the
25 shank. What he admitted to was, basically, he wanted

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1 to be involved in this, but his physical limitations
2 were such that the most he could provide was his
3 walker, which provided the metal to the shank. And
4 if you see the walker, after the murder was
5 conducted, you have a walker with a missing piece of
6 metal. And one of the shanks that was recovered fits
7 perfectly into that. I mean, it's pretty obvious
8 where it came from.

9 In addition to that, there were two other
10 shanks that were recovered.

11 THE COURT: All right. That's a lot of
12 info.

13 MS. ARMIJO: Sorry about that.

14 THE COURT: Let's focus for a second. It
15 didn't seem to me that you were running away from the
16 possibility that you may argue that Mr. Montoya
17 handled the shanks.

18 MS. ARMIJO: Oh, absolutely. We think he
19 handled the shank. We think he's a shaker. He and
20 Mr. Armenta both, it's our theory that they were the
21 two that were told to go and do this crime, to kill
22 him. And they are seen assaulting. Whether or not
23 you want to say -- whether he says, Oh, there was an
24 assault that occurred, I mean, they were both killing
25 Mr. Molina.

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1 THE COURT: Well, I was pressing
2 Mr. Hammond a minute ago, saying, but I didn't see
3 how Mr. Montoya was linked to the shanks, given his
4 description of the video. But if the Government is
5 not going to run away from the fact that he has a
6 link to the shanks, then respond to what I think Mr.
7 Lowry, but certainly Mr. Hammond, is now focused on
8 the fact that, well, they need to talk to this --
9 find out who this CHS is to find out where they got
10 these shanks that they're being accused of using on
11 Mr. Molina.

12 MR. BECK: Well, I guess, Your Honor --

13 THE COURT: I didn't mean to tell Mr. Beck
14 to answer. You're welcome to answer it, too.

15 MS. ARMIJO: That's fine. I just wanted to
16 put -- I mean, as you know, Mr. Beck is newer to this
17 case -- and is familiar with it -- but I didn't want
18 to put him in a spot, given that there is many moving
19 parts. And I didn't want to interrupt the argument.

20 THE COURT: You're welcome to interrupt
21 from my standpoint. Mr. Beck.

22 MR. BECK: Mine, too, yeah.

23 Your Honor, so I guess this then goes back
24 to the analysis under Roviaro, and whether the
25 information that, I guess, Mr. Hammond thinks the CHS

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1 may have is significant testimony. And so, under one
2 version, Mr. Montoya doesn't have shanks. And I
3 think you're right, under that version, then, the
4 significance of the testimony here that --

5 THE COURT: If he just roughed him up at
6 the bottom of the stairs --

7 MR. BECK: Then the shanks don't matter.

8 THE COURT: But if the Government is
9 saying, yeah, he's a shankster -- is that the right
10 word? Is that a real word?

11 MR. BECK: I think it was shanker. You
12 added an S.

13 THE COURT: Shanker. If they're agreeing
14 with Mr. Hammond that there may be -- that Mr.
15 Montoya may have had a shank, then --

16 MR. BECK: So then it comes to, what are
17 the defenses? And so, first of all, Mr. Hammond
18 argued that he was in the same position as Mr. Baca.
19 And I think Your Honor said that the importance of
20 the shanks to Mr. Baca relate to the time period,
21 because the evidence linking Mr. Baca to this is that
22 he sent paperwork to SNM CF. That defense that he
23 didn't do that, there wasn't time to do that, doesn't
24 affect that Mr. Montoya had a shank and killed Mr.
25 Molina. Regardless, where he got that shank,

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1 regardless who provided that shank, regardless
2 whether it was -- came from Mr. Perez' walker, or it
3 was one of the other two --

4 THE COURT: Well, I think I'm beginning to
5 understand a little better what Mr. Hammond is
6 saying. Let me see if I can articulate it in my
7 words; that, if this confidential informant is going
8 to testify that Mr. Perez specially made this shank
9 or these shanks from this walker in a very short
10 period of time, in a 24-hour period of time, that
11 couldn't have been done. And right now that seems to
12 be one reading of what this confidential informant is
13 saying; that these shanks were made specifically to
14 be the murder weapons for Mr. Molina.

15 MR. BECK: Right. So I think there is two
16 parts to that. The first is to go back and look at
17 what the CHS is saying, which is that Perez provided
18 his walker to make shanks that were used in the
19 murder. So there is no time period here. This CHS
20 does not testify that paperwork on Javier Molina --
21 excuse me, testify is wrong -- this CHS's testimony
22 doesn't talk about the paperwork going down for
23 Javier Molina.

24 THE COURT: It doesn't. But I mean, even
25 y'all are saying, the Government is saying that you

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1 think that there was some paperwork.

2 MR. BECK: That happened, right. Now, what
3 we're saying is there are three shanks, and not
4 necessarily all of them came from Mr. Perez' walker.
5 And Mr. Montoya here didn't send the paperwork that
6 made the shanks, didn't send the paperwork that
7 resulted in the killing of Mr. Molina.

8 THE COURT: Well, do you --

9 MR. BECK: He did the killing.

10 THE COURT: -- know that? I mean, it seems
11 to me that we just don't know when from this, unless
12 you've got some independent knowledge as to when
13 Mr. Perez began to make these shanks.

14 MR. BECK: Right.

15 THE COURT: Do you have any other evidence
16 other than this statement? I thought that was the
17 whole point of Mr. Villa's motion, is there is no
18 other evidence linking him to this crime other than
19 this half a sentence.

20 MR. BECK: There is a recording of
21 Mr. Perez talking about giving his walker to make
22 shanks. So there is a firsthand recording of
23 Mr. Perez saying he did that.

24 THE COURT: Is it any more than this
25 statement, though?

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1 MR. BECK: I think it is more than a
2 sentence that he provided.

3 THE COURT: But I mean, is it more
4 information than that? It doesn't help us with the
5 timing of it, whether this was done a year in advance
6 or six months or 24 hours?

7 MR. BECK: Right. It doesn't help with the
8 timing of that. But, again, I think that may be
9 salient for Mr. Baca. But when we're looking at Mr.
10 Montoya, he had a shank, and he stabbed Mr. Molina.
11 And so --

12 THE COURT: Both of them are arguing that
13 that couldn't have happened.

14 MR. BECK: I don't think they're arguing
15 that he couldn't have had a shank, which is what --

16 THE COURT: Well, he couldn't have had the
17 shanks.

18 MR. BECK: He couldn't have had the walker
19 shanks, right. And so what I'm saying is, is that
20 may be helpful; that may be significant testimony for
21 Mr. Baca; that may be significant testimony for
22 Mr. Perez. But that is not significant testimony for
23 Mr. Montoya, who is seen on a video stabbing, or what
24 we contend is the video showing him stabbing Mr.
25 Molina. Certainly, the video shows that he assaulted

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1 Mr. Molina, as I think Mr. Hammond conceded. We
2 contend that there is a shank. And we contend the
3 video shows him giving the shank to Mr. Rodriguez.

4 So for him, the significance of Mr. Perez'
5 walker becoming a shank is not as significant to him
6 as it is to Mr. Baca. I think it's important that we
7 distinguish between those two. Because, again,
8 whether he had a shank or he didn't is significant to
9 Mr. Montoya. But this CHS does not provide any
10 salient information whether Mr. Montoya had a shank
11 or he didn't. That would be, I think, going back to
12 where I started this, I think that would be Mr.
13 Armenta's testimony, or statement, that's referred to
14 here, which they already have.

15 So now they have Mr. Armenta's, with regard
16 to the walker becoming a shank. They have Mr. Perez'
17 recording where he talks about that. So any benefit
18 of this CI's testimony would be cumulative to Mr.
19 Montoya and not helpful, when he is the one who did
20 the shanking, I think we're calling it.

21 THE COURT: All right. Anything else, Mr.
22 Beck?

23 MS. ARMIJO: Your Honor, did you want more
24 information about what Mr. Perez said? I believe
25 that was one of the questions that you had. Or were

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1 you satisfied?

2 THE COURT: No, you can tell me what more
3 you know he said.

4 MS. ARMIJO: Mr. Perez had indicated that
5 he supplied two pieces of his metal from his walker
6 to be fashioned into shanks for use during the
7 murder. He indicated he even verified the murder
8 with Daniel Sanchez, and that the weapons would be
9 used for the murder. Mr. Perez went on to talk about
10 why the murder occurred and why it was justified. He
11 stated that he was proud to be assisting the SNM in
12 this matter.

13 THE COURT: Somebody on the phone, we're
14 picking up some feedback. I think y'all have been
15 using mute buttons during the day. If you'll check
16 and make sure you get your mute button back on until
17 you're ready to talk.

18 All right. Anything else, Ms. Armijo?

19 MS. ARMIJO: No, Your Honor.

20 THE COURT: Mr. Beck?

21 MR. BECK: No, Your Honor.

22 THE COURT: All right. Thank you, Mr.
23 Beck.

24 Before I hear from Mr. Hammond, anybody
25 else want to say anything else?

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1 MR. VILLA: Your Honor, just briefly. A
2 lot of this is news to us, hearing about these --

3 THE COURT: I'm interested in that. Tell
4 me what's news to you.

5 MR. VILLA: Well, these very specific
6 statements that Ms. Armijo just recited coming from a
7 recording. So I alluded to it this morning about
8 some audio recordings that were disclosed. The bulk
9 of those are inaudible; you can't necessarily hear.
10 Sometimes it's hard to tell who is even being spoken
11 to. You can generally tell who is wearing the body
12 recording, because their voice is louder. But the
13 others that are talking to the individual wearing the
14 body recording are hard to discern. We've had some
15 of those transcribed. The transcriptionists have had
16 issues hearing that.

17 THE COURT: So Ms. Armijo's two or three
18 sentences there that she thinks that she said
19 Mr. Perez is said to have said, you don't think you
20 have those?

21 MR. VILLA: Well, and if I do, I can't hear
22 it. And so perhaps it's the CHS informing Ms.
23 Armijo: This is what he told me. It's on that
24 recording, just go listen to it. But we can't hear
25 it. Which I think -- so my inquiry now because I

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1 have agreed to not pursue our motion. But my inquiry
2 to Ms. Armijo or the Government would be, Can you
3 tell us which particular recording it's on, so we can
4 determine if it's actually been disclosed.

5 THE COURT: Well, it looked like she was
6 reading something.

7 MR. VILLA: So I haven't read any reports
8 where those words are uttered. The only reports that
9 I've read is the document you have in front of you,
10 which is Exhibit 1 to my motion. I guess I'm just a
11 little concerned that there is information that
12 hasn't been produced, or I don't know what. But I
13 think it gets to some of the issues Mr. Lowry raised
14 and Mr. Davis raised about these recordings that the
15 Government is alleging exist. And all three of us
16 have not heard them, or don't recall listening to
17 anything that say those types of things.

18 THE COURT: All right. Thank you, Mr.
19 Villa.

20 Anyone else want to speak before
21 Mr. Hammond has the last word?

22 MR. LOWRY: Your Honor, one last thing --
23 and I'll try to make it brief and I'll try to use
24 this microphone.

25 Your Honor, I just think, you know, the

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1 Government is in a position of wanting to have their
2 cake and eat it too, although I never understood that
3 quite well. But if this hit was -- pardon me, let me
4 get back here.

5 What I just heard the Government recite in
6 terms of evidence was something I heard for the first
7 time, that this hit was a valid hit, and that it
8 persisted for years, which strikes me as a bit odd
9 then, that they needed paperwork to again revalidate
10 a valid hit. I mean, if there was a valid hit on Mr.
11 Molina issued by the SNM, there would have been no
12 need to wait on paperwork. So either the paperwork
13 was the valid hit, or there existed, I guess, a quasi
14 rumor previously. It just strikes me as odd that, if
15 there is a valid hit, as the Government has
16 described, and these valid hits can persist for years
17 and years and years, that anyone would have required
18 paperwork to come down from Santa Fe. I'm having
19 difficulty squaring the two.

20 THE COURT: Well, hold on just a second,
21 because Mr. Beck did tell me that it's still part of
22 their theory that there was paperwork, maybe that
23 last week. What -- can you expand at all and tell me
24 what does this paperwork -- how does it fit into your
25 picture?

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1 MR. BECK: So, again, I don't think it's
2 inconsistent. What happens is that there may be a
3 hit out. And the way that the SNM operates is that
4 they have to have paperwork to validate a hit. And
5 so, if someone were to say that there is a hit out on
6 Javier Molina, someone may say, I want to make sure
7 that's right, show me the paperwork. And so those
8 two theories are not inconsistent.

9 MR. LOWRY: But this comes back to the
10 essential question of this endeavor, which is the
11 timing of the manufacturing of the shank.

12 THE COURT: Well, I think you may have me
13 persuaded on that. You can talk me out of it.

14 MR. LOWRY: No, no, no, I don't want to
15 talk you out of it. I'm done.

16 THE COURT: I'm working with Mr. Hammond,
17 here, and he didn't have me quite persuaded.

18 I didn't mean to cut you off. All right.
19 Anybody else want to help Mr. Hammond?

20 MR. LOWRY: No, Your Honor. I know when to
21 say when.

22 THE COURT: All right. Mr. Hammond, I
23 guess I'm where Mr. Beck is, their theory is Mr.
24 Montoya had a shank; it doesn't matter where it came
25 from.

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1 MR. HAMMOND: That's very interesting.
2 And I know you care a lot about federal
3 jurisdiction. You may wonder why this case started
4 out in state court as a homicide, and now is part of
5 a federal violence in aid of racketeering case. If
6 this is just a homicide, even if the shank was
7 used -- and we contend that our client didn't have a
8 shank, and we'll argue about that at length some day.
9 But the Government cannot prevail in this Court
10 unless they can prove to the satisfaction of a jury
11 that this homicide was a violent act in aid of
12 racketeering, which means one of the critical
13 elements is that the perpetrators had to be acting to
14 advance or further or maintain their position in the
15 gang.

16 So, if this is just a homicide, like there
17 are many in every state prison in America, these
18 defendants will not be chargeable in this Court. So
19 for them to say it doesn't matter where the shank
20 came from; of course it matters. It matters a great
21 deal whether somebody ordered this, and whether our
22 client knew that it had been ordered. And showing
23 that the shank was ordered and came from one of the
24 other defendants for a specific purpose would be a
25 critical element in their proof.

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1 THE COURT: Well, that may be true, but how
2 does that help you for them to give you another nail
3 in their case against you? I mean, it seems like --

4 MR. HAMMOND: I think -- excuse me for
5 interrupting.

6 THE COURT: That's all right.

7 MR. HAMMOND: I think it's important that
8 we know whether the shank was or was not part of the
9 plan of racketeering activity.

10 If it turns out that Mr. Perez just made
11 shanks for there to be in the pod -- and frankly,
12 that wouldn't surprise me if there were shanks in
13 pods all across this state, I wouldn't be surprised
14 by that. But there is a lot of difference between
15 having a shank in a pod and having a shank that is
16 there because someone says that the SNM ordered it to
17 be there, and to be used for a specific purpose. And
18 that is what I understand -- at least a piece of that
19 is what this CI is going to say. And I believe we
20 need to know that.

21 THE COURT: All right. Thank you, Mr.
22 Hammond.

23 Mr. Beck?

24 MR. BECK: I mean, I guess I just reiterate
25 to the Court that, as the Court started out, it's an

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1 individual analysis. So I think that may be
2 important to Mr. Perez. But I think, when you're
3 looking at whether the CI's testimony is significant
4 to Mr. Montoya, where the shanks came from is not.
5 It's important that it was an SNM hit. It's
6 important that there was paperwork. It's important
7 that there were shanks. But where that particular
8 shank came from may be significant under the Roviaro
9 analysis as to Mr. Perez, where it may not be to Mr.
10 Montoya.

11 THE COURT: Anything further, Mr. Hammond?

12 MR. HAMMOND: No, I think I've said enough.

13 THE COURT: Well, I think that probably
14 Mr. Hammond and Mr. Beck have probably dragged me
15 back to where I was with Mr. Baca. I'm inclined to
16 find that the CI should be disclosed. We've got this
17 Jencks issue that I'm going to have to deal with as
18 far as timing. But if I, in fact, order CI disclosed
19 at this time, then I'm inclined to think it should be
20 disclosed as to Mr. Baca.

21 I'm not convinced as to Mr. Montoya. I
22 think that -- like I said originally, I think your
23 situation is more akin to Mr. Troup's back here. If
24 I start lowering the bar to that level, that we just
25 want to know whether there is a scheme, or whether we

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1 want to know who is present, probably I'd drop the
2 bar to a point where almost all these CIs will be
3 disclosed. And I don't think that's probably what
4 the law requires.

5 So I'll give it some thought, but I'm not
6 inclined to grant Mr. Montoya's request.

7 All right. Are we done with that CI? Is
8 there anybody else that am I missing? Anybody that
9 had a request in on that?

10 Mr. Beck?

11 MR. BECK: I think so, Your Honor.

12 THE COURT: You think there is other people
13 or you think we're done?

14 MR. BECK: No, sorry. I think we're done.

15 THE COURT: You think we're done. Okay.

16 Now, my understanding, like Mr. Jewkes and
17 some others were mentioning other CIs, but that's the
18 only thing that was briefed up for today was that one
19 CI. I know tomorrow I think I'm back in with Mr.
20 Gallegos on his CIs. So I've got those issues
21 tomorrow. But am I missing anything, any other CIs
22 teed up?

23 All right. Now, Mr. Gallegos had also
24 filed a motion.

25 MR. BECK: Your Honor --

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1 THE COURT: Yes.

2 MR. BECK: If we're moving on, I do want to
3 put in one other point here before we move on. And
4 that's that, if Your Honor does -- after reviewing
5 the hearing, and is inclined to grant disclosure of
6 the CI in Mr. Baca's case, regardless which way you
7 go on the witness, the United States would ask that
8 the Court impose a protective order, as Your Honor
9 did in Aguilar, that limits the disclosure to Mr.
10 Baca, to his counsel. And I can probably look at it.
11 If you'd like me to put it on there, I think you got
12 it.

13 THE COURT: I think I got it from Mr.
14 Villa.

15 MR. BECK: You have it there also.

16 THE COURT: I guess I'm inclined to do that
17 as a starting point for all these CIs: Order
18 disclosed. And then if, down the road, that's
19 unworkable for some reason, you can re-approach. But
20 I think it's a good starting point, is to limit it to
21 that. I think -- I actually thought the protective
22 order was pretty workable and pretty generous, given
23 what we're dealing with here. I've seen more
24 restricted protective orders.

25 MR. LOWRY: Your Honor, I've reviewed the

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1 protective order in Mr. Perez' case, and we have no
2 opposition.

3 THE COURT: So I'll include that as part of
4 my order if I continue to go the direction with Mr.
5 Baca that I think I am.

6 MR. VILLA: Your Honor, I apologize. This
7 might be the right juncture to address, if the Court
8 does grant that whether the protective orders would
9 include us being able to communicate with Mr. Lowry
10 and Ms. Duncan, but nobody else?

11 THE COURT: I guess I don't see any harm in
12 that. Do you, Mr. Beck?

13 MR. BECK: No, Your Honor.

14 THE COURT: Okay. So it will include that.
15 I guess, if you know a CI, however you got it, I
16 can't see any reason why those defendants -- those
17 defendants and those defense lawyers cannot talk to
18 each other about it. Do you?

19 MR. BECK: I see a lot of reasons. But I
20 can't think of any that the law would support. So --

21 THE COURT: Well, that's all we're about,
22 isn't it?

23 Let me talk to Ms. Wild here just for a
24 second.

25 (A discussion was held off the record.)

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1 THE COURT: All right. The next thing I
2 think we have is the motion that Mr. Gallegos filed
3 in all three cases. Now, he's been -- oh, okay, so
4 remember that he filed in this case -- well, he filed
5 it in the Baca case; he filed it in his own case, I
6 guess, 1613. And you joined -- Ms. Sirignano, Mr.
7 Adams, you joined this motion to compel production of
8 unredacted discovery and the identification of
9 confidential informants. So I guess that motion,
10 which Mr. Gallegos is out, the reply was filed in
11 this case. So do you have either, A, unredacted --
12 or is there anything about your motion to compel
13 production of unredacted discovery you want to argue,
14 or is there anything about the identification of
15 confidential informants that you want to argue?

16 MR. ADAMS: Your Honor, yesterday we
17 decided to do additional briefing on that motion for
18 you. And we would just do that in both cases.

19 THE COURT: In both cases, okay.

20 MR. ADAMS: Yes.

21 THE COURT: Okay. So this one is the one
22 you're going to supplement?

23 MR. ADAMS: Yes, sir.

24 THE COURT: And help me out here, are you
25 going to supplement in this case? Are you going to

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1 supplement in the Baca case?

2 MR. ADAMS: In all three cases.

3 THE COURT: In all three. So just delay it
4 until --

5 MR. ADAMS: No, sir, I think we saw which
6 way the wind seemed to be blowing yesterday. We
7 thought it would be more prudent to make a more
8 particularized showing to the Court, so we'd have a
9 fighting chance to get what we're asking for.

10 THE COURT: All right. So you've kind of
11 got a taste of how I do these.

12 MR. ADAMS: Yes, sir.

13 THE COURT: So that gives you the level of
14 facts I think I need.

15 Let me talk to Ms. Wild here a second.

16 (A discussion was held off the record.)

17 THE COURT: Well, this may apply to your
18 motion, but I'm going to tell the Government -- and
19 since Mr. Gallegos is not here, Mr. Ray, Mr. Evans
20 and Ms. Morrissey are not here -- if you'll pass this
21 on to them as soon as you can, because I know y'all
22 are going to have a set-down tomorrow. But it goes
23 to everybody. We're going to be discussing
24 redactions tomorrow. And like the motion that was
25 filed, sort of a blanket attack on redactions, first,

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1 I'd encourage everybody to sit down, the Government
2 and the defendants. If you don't like some of the
3 redactions, sit down and try to work them out. And
4 then bring the ones that you can't agree or live
5 with. But I'm probably going to take them one at a
6 time. I mean, I don't know how else to do it. I've
7 just got to put the energy into it. So think about
8 it. Is it worth fighting over? You know, do the
9 defendants really need Social Security numbers,
10 telephone numbers, personal IDs? Those things are
11 commonly redacted. Do you really need that sort of
12 information? So think about, you know, what we're
13 fighting over. If that's what you want to fight
14 over, I'll rule on it.

15 But I think the thing to pass on to Mr. Ray
16 and Mr. Evans and Ms. Morrissey before tomorrow's
17 hearing and before y'all, is that we're going to take
18 these one at a time. I mean, I'm probably not going
19 to make blanket rulings on redactions or blanket
20 rulings on confidential informants. So we're going
21 to have to take them one at a time, and everybody may
22 want to pick their battles carefully.

23 I think I'm done with what's on my platter.
24 So let me open it up a little bit while we're
25 together, and see if there are other things I can

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1 help you with. Let me start with the Government.

2 Ms. Armijo, Mr. Castellano, Mr. Beck, is there
3 anything else we need to discuss while we're
4 together? Anything else I can do for you?

5 MS. ARMIJO: Not as to the big group. I
6 believe that one of the defendants has a motion
7 appealing her detention, and it hasn't been set yet.
8 But certainly we'd be -- and our time to respond has
9 not come, but we'd be willing to respond orally, and
10 have the hearing if the Court is available. I'm sure
11 that that defendant would certainly like to have that
12 issue resolved. It doesn't have to be before
13 everybody, though.

14 THE COURT: Is that yours, Ms. Arellanes?

15 MS. ARELLANES: It is, Your Honor.

16 THE COURT: Do you want to do it today? Do
17 you want to do it another day?

18 MS. ARELLANES: I don't have the motion
19 with me at the moment.

20 THE COURT: But you've got it memorized;
21 right?

22 MS. ARELLANES: No.

23 THE COURT: Do you want it today or another
24 day?

25 MS. ARELLANES: Another day.

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1 THE COURT: All right. We'll make it
2 another day.

3 What else from the Government? Anything
4 else we need to discuss? Anything else I can do for
5 you?

6 MS. ARMIJO: That's all, Your Honor.

7 THE COURT: How about the defendants, Mr.
8 Lowry?

9 MR. LOWRY: Your Honor, just briefly. I
10 mean, I know -- and I want to thank the Court,
11 because I know it takes a considerable amount of
12 effort to pull off these hearings. This is just a
13 matter of housekeeping. You know, I wanted to thank
14 the Court for holding this hearing, and I know the
15 Court did this on short notice.

16 I just want to propose -- and I haven't had
17 an opportunity to talk with my colleagues from the
18 United States -- but maybe going forward, if it
19 wouldn't be advantageous to start setting a date
20 aside, you know, in advance. Or maybe we could have
21 like a monthly date the Court could easily vacate if
22 we didn't need it. But I know that many people have
23 to travel from out of state, and the court calendars
24 for this many attorneys being what they are, it would
25 be nice to get some dates posted in the future, so

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1 people can protect and preserve those dates. I think
2 we're going to enter a phase of this case where
3 motions practice is going to start ramping up. And I
4 don't know how my colleagues feel. But I think would
5 it be wise if we could start securing dates, you
6 know, a month or two out, just to facilitate getting
7 everybody together in the same courtroom efficiently.

8 THE COURT: Let me ask Ms. Wild. Let her
9 come up here and talk to me just about the logistics
10 of that.

11 (A discussion was held off the record.)

12 THE COURT: Mr. Romero, are you still
13 there?

14 MR. ROMERO: Yes, sir.

15 THE COURT: Okay. We lost somebody else on
16 the line.

17 (A discussion was held off the record.)

18 THE COURT: How would this work? I'm a
19 little reluctant to -- you know, sometimes in these
20 complex cases, we'll have periodic status reports or
21 periodic status conferences, kind of run them out for
22 eternity, say every 60 days, or something like that.
23 I'm a little reluctant to do that in this case. But
24 I am willing to try to work with everybody to set a
25 date right now that's a little bit -- that's just

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1 shortly before I go into a real string of long trials
2 that I really think are going to go at this point.
3 So would that be helpful? Instead of saying let's do
4 one every 60 days, what if I set one out -- maybe set
5 one for January 18 at 8:30? That would give
6 everybody plenty of time to get something set on
7 their calendar and travel vouchers. Would that be
8 helpful?

9 MR. LOWRY: Your Honor, it's really less of
10 a concern for Team Baca, because Ms. Duncan and I
11 both reside in Albuquerque. So being here is really
12 not an issue. But it was really addressed to my
13 colleagues.

14 THE COURT: Does that address your concern?
15 Instead of saying every 60 days, because I'm not
16 sure -- I mean, this is an important case, but I've
17 got a lot of cases I'm trying to juggle. And I can't
18 bring everything to a shutdown for this one case. So
19 would that work?

20 How about from the Government standpoint?
21 This doesn't mean we don't get back together earlier.
22 There may be motions that get filed and we have to
23 get together earlier. But it does get something on
24 the calendar that everybody can plan on.

25 MR. BECK: I think that's fine, Your Honor.

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1 The only thing, I mean, that concerns me is that
2 there may be responses or replies or something. But
3 I think we can all work together to try to get them
4 in beforehand, and just see what we could do with
5 this. So I think it's a good idea.

6 We can even have it in Las Cruces, if you
7 want.

8 THE COURT: Okay. Well, you're kind of in
9 control of that. I think we all owe the Government a
10 bit of thanks for humoring us or something by
11 allowing us to continue to do these up here.

12 How about from the defendants? Is this
13 helpful? Set a hearing on January 18, 2017; nobody
14 is barred from asking for one earlier, but it will
15 get something on and people can then kind of get
16 briefing done, knowing that that's going to be here.

17 Ms. Johnson?

18 MS. JOHNSON: Your Honor, because I
19 anticipate filing some motions before January 18, I
20 would think that the Court may set my motion hearing.
21 But both Ms. Fox-Young and I have sentencing hearings
22 in the Western District Texas that day. So we would
23 respectfully ask that the Court perhaps consider a
24 different day.

25 MS. STILLINGER: Your Honor, Mary

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1 Stillinger for Mr. Varela. I know I have an argument
2 in the Tenth Circuit the day before. And I'm
3 actually not sure, I'm probably on the morning
4 calendar. But just with travel, I don't know if I
5 would be able to be here on that day or not either.

6 THE COURT: Mr. Lowry? This is why this
7 doesn't work.

8 MR. LOWRY: That's fine, Your Honor. It
9 was just an idea.

10 THE COURT: I don't know. Maybe it's not
11 worth the effort.

12 MR. LOWRY: I guess not.

13 THE COURT: Let me see Mr. Adams first,
14 Mr. Hammond, then --

15 MR. ADAMS: Thank you, Your Honor. I was
16 going to further complicate matters. I think it is a
17 wonderful idea to set dates far enough in advance
18 that we can have time to navigate the CJA travel
19 approved issues that we seem to run into. I am -- I
20 have a jury selection in Federal Court in South
21 Carolina on the 18th. So that also is not an
22 advantageous date for me. But I applaud the effort,
23 and would love the 19th or the 20th, or if I have to
24 miss, I have to miss. But I think it would be very
25 helpful going forward to have a series of dates well

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1 in advance, so we can all keep pushing this case
2 forward, since the trial is set for the summer.

3 THE COURT: I'll try one more date. And if
4 it doesn't work, then we're going to quit this. How
5 about February 7?

6 MS. STILLINGER: I'm sorry, Your Honor,
7 I -- oh, no, no, no, I'm sorry. Never mind, wrong
8 day of the week.

9 THE COURT: All right. Mr. Hammond, you
10 were going to speak? Is that how bad the other date
11 was, or you got --

12 MR. HAMMOND: No, no, I wasn't going to say
13 the other day was bad. I'm going to thank the Court
14 and Mr. Lowry and the Government for the idea.

15 We will have, on behalf of Mr. Montoya, I
16 know we will have a couple more motions of our own
17 that we'd like to have argued. February would be
18 preferable. But if everybody agrees with the 7th of
19 February, we can agree to that.

20 THE COURT: Ms. Sirignano?

21 MS. SIRIGNANO: Judge, I'm in Santa Fe
22 before Judge Attrep. As I said yesterday, I'll try
23 and get it moved. If I'm the only one, then I'll --

24 THE COURT: Just live with it.

25 MS. SIRIGNANO: I'll live with it.

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1 THE COURT: Okay. Is that all right with
2 the Government, February 7?

3 MS. ARMIJO: Yes, Your Honor.

4 THE COURT: Anybody else?

5 All right. We'll set it for February 7.

6 We're going to set it for 8:30, and we're going to
7 move it up just a little bit, just because it seems
8 like every time we set these, we get started late.

9 So we'll build in a little bit of late time, and see
10 if we can get them started a little bit on time. So
11 February 7, at 8:30, 2017.

12 Ms. Stillinger?

13 MS. STILLINGER: Your Honor, may I raise
14 one issue to the Court, which is that my client,
15 Mr. Varela, asked me if he might be able to be
16 excused from appearing at hearings when they're not
17 evidentiary. I didn't ask for this hearing because I
18 understood that another defendant had made that
19 request and had been denied. But I did want to make
20 that request on the record. It's very uncomfortable
21 for him, Your Honor. He gets up at 3:00 in the
22 morning from Otero, and is here all day long. He's
23 shackled all day long. So it's about -- well, more
24 than 12 hours of constant shackling. It's very hard
25 on his wrists. Last time, it was a couple of weeks

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1 before he had full feeling in his arms again. It's
2 just the nature -- I know, he's a little husky -- but
3 that's just the nature of the handcuffs, I think
4 they're not meant to be worn all day long like that.
5 So I've asked him if he really means that, and he
6 says he really would rather not come, and would
7 rather hear about it from me later. I wanted to
8 bring it up while he's here, so if the Court needs to
9 verify.

10 THE COURT: Well, I think everybody needs
11 to be here. These are very important hearings.
12 We're really shifting into facts. These are not
13 purely legal issues. These are fact-sensitive
14 matters. And I just am very reluctant to be
15 discussing the facts in the detail we are without the
16 defendants present. This is -- these aren't strictly
17 legal issues. These are very fact-sensitive. So I'm
18 going to deny that request.

19 MR. BENJAMIN: Your Honor --

20 THE COURT: Mr. Benjamin?

21 MR. BENJAMIN: -- Mr. Gallegos is at Otero.
22 And if there was some way that the Court could deal
23 with essentially the 18-hour timeframe that they're
24 out of Otero in shackles, I think that would
25 accommodate most of our concerns, if not all of them.

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1 THE COURT: Well, I'm all game for
2 suggestions. But I don't have any right at the
3 moment.

4 Mr. Jewkes?

5 MR. JEWKES: In that regard, Your Honor,
6 might the Court and the Marshal Service reconsider
7 with regard to these black boxes that go with the
8 belly chains. With belly chains, leg irons, they're
9 pretty secure.

10 THE COURT: I understand. And y'all
11 remember that I sat up here for an hour and a half
12 with those blocks on, so that I'd know what it feels
13 like. I'm not minimizing -- they're not very
14 comfortable. But I also don't have any other
15 suggestions. So I'm probably going to take the
16 guidance from the marshals on that. If they continue
17 to think that's something that's necessary for
18 security, we'll just have to live with it.

19 What else? Anything else we need to
20 discuss while we're together? Anything else I can do
21 for you? The defendants? All right. I've got some
22 opinions and orders to get out to you. If I don't
23 see you before the holidays, have good holidays. See
24 you in February, if we don't meet before. I
25 appreciate everybody's hard work. (Adjourned.)

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9 do hereby certify that the foregoing pages constitute
10 a true transcript of proceedings had before the said
11 Court, held in the District of New Mexico, in the
12 matter therein stated.

13 In testimony whereof, I have hereunto set my
14 hand on December 13, 2016.
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